

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA  
3 WEST PALM BEACH DIVISION  
4 CASE NO. 23-cr-80101-AMC

5 UNITED STATES OF AMERICA, Fort Pierce, Florida

6 Plaintiff, April 12, 2024

7 vs.

2:03 p.m. - 4:06 p.m.

8 DONALD J. TRUMP, WALTINE NAUTA, CARLOS  
9 DE OLIVEIRA,

Defendants. Pages 1 to 108

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10 TRANSCRIPT OF MOTION HEARING  
11 BEFORE THE HONORABLE AILEEN M. CANNON  
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 FOR THE GOVERNMENT:

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19

LAURA E. MELTON, RMR, CRR, FPR  
20 Official Court Reporter to the  
Honorable Aileen M. Cannon  
21 United States District Court  
Fort Pierce, Florida  
22  
23  
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1 (Call to the Order of the Court.)

2 THE COURT: Good afternoon. Please call the case. And  
3 you may all be seated unless you're addressing the Court.

4 COURTROOM DEPUTY: United States of  
5 America vs. Donald J. Trump, Waltine Nauta, and  
6 Carlos De Oliveira. Case Number 23-cr-80101.

7 Will parties please make your appearance, starting with  
8 the government.

9 MR. BRATT: Good afternoon, Your Honor. Jay Bratt and  
10 David Harbach on behalf of the United States.

11 THE COURT: Good afternoon.

12 MR. FIELDS: Good afternoon, Your Honor. Lazaro Fields  
13 on behalf of President Trump.

14 THE COURT: Who is here for Mr. Nauta?

15 MR. WOODWARD: Good morning, Your Honor -- good  
16 afternoon, Your Honor. Stanley Woodard and Sasha Dadan for  
17 Mr. Nauta.

18 THE COURT: Good afternoon to you. And good afternoon  
19 to you, Mr. Nauta.

20 Who is here for Mr. De Oliveira?

21 MR. IRVING: Good afternoon, Your Honor. John Irving  
22 and Donnie Murrell for Mr. De Oliveira.

23 THE COURT: Good afternoon to you both. And good  
24 afternoon to you, Mr. De Oliveira.

25 MR. DE OLIVEIRA: Thank you.

1           THE COURT: All right. Before we get started, as  
2   usual, I will remind the parties that possession or use of  
3   electronic equipment in the courtroom, except as authorized for  
4   counsel -- and Mr. Woodward, I'm going to ask that you stop  
5   fiddling with your phone -- is strictly prohibited; that  
6   includes any broadcasting, photographing, recording, or filming  
7   of any kind. Obviously, we have, as usual, set up our  
8   second-floor overflow room, and there should be no attempt to  
9   circumvent any of these rules in that overflow room either.

10           Also, I would ask that everybody remain seated  
11   throughout the duration of the hearing so as to avoid  
12   interruption.

13           With that, we have set for hearing this afternoon,  
14   three motions. In the following order: First, Defendant  
15   De Oliveira's motion to dismiss the superseding indictment, or  
16   alternatively, for a bill of particulars. That motion is  
17   docketed at entry 323. There is a response in opposition filed  
18   by the Special Counsel at docket entry 372, and there is a  
19   reply in support of a motion at docket entry 413.

20           I'm going to start off with that motion today, just so  
21   you all can prepare in terms of sequence.

22           Then next up, we have Defendant Nauta's motion for a  
23   bill of particulars; that has now been docketed at entry 446,  
24   with the reply filed at 447. And there is an opposition at  
25   380.

1           And finally, Defendant Nauta's motion to dismiss  
2   Counts 33, 34, 35, 40, and 41, in the superseding indictment,  
3   based on the meaning of the term "corruptly" in  
4   Section 1512(c); that has now been docketed at entry 448, with  
5   the reply at 449, and an opposition at 379.

6           All of these filings are now publicly filed with the  
7   exception of one exhibit which is the full transcript of  
8   Mr. Nauta's grand jury testimony. And I asked the parties to  
9   be prepared to discuss what to do about continued sealing of  
10   that transcript.

11           So with that, I will add that I have reviewed all of  
12   the motions and the related papers. I'm prepared to hear  
13   argument. And because these are all defense-brought motions, I  
14   will start, of course, with defense counsel and, as indicated,  
15   with Mr. De Oliveira's motion.

16           Who will be taking the lead on that motion?

17           MR. IRVING: I will go ahead and do that, Your Honor.

18           THE COURT: Okay. And if you could present argument  
19   from the lectern, please.

20           MR. IRVING: Of course.

21           Good afternoon, Your Honor.

22           So I have been scratching my head about this indictment  
23   for quite some time. And it's -- it's a welcome opportunity to  
24   finally be able to discuss some of this.

25           But it -- this -- in -- the superseding indictment is

1 53 pages of square peg in a round hole that fails to allege  
2 even on its face -- and I understand that we have to deal with  
3 the four corners of the indictment. I'm not suggesting that  
4 this is an evidence suppression motion or a Rule 29 motion or  
5 anything like that further down the road. I get it. But even  
6 taken on its face, it fails to allege that Mr. De Oliveira  
7 committed any crime. It fails to allege that he had any idea  
8 that any of these boxes in question contained classified  
9 documents; I think the government's conceded that, if I'm -- if  
10 my reading of their prior filings is correct.

11 It accuses him of conspiring to prevent  
12 Trump Attorney 1 from seeing precisely the documents that he  
13 and Mr. Nauta allegedly moved into the storage room, which  
14 makes no sense, why he would -- I mean, that's a funny way to  
15 hide something from Trump Attorney 1, is to move a bunch of  
16 boxes into a storage room that he then immediately reviews.

17 It fails to allege that Mr. De Oliveira had any idea  
18 that there were subpoenas issued for the -- for classified  
19 documents at first, or then for CCTV -- security footage of  
20 Mar-a-Lago --

21 THE COURT: What is your understanding of the level of  
22 specificity that is required in the case law to allege  
23 knowledge of an official proceeding?

24 MR. IRVING: I think, Your Honor, that it needs  
25 to -- obviously, tracking the statutory language, and I

1     don't -- I'm not arguing that it doesn't do that. But  
2     when -- but the case law discussed in the -- in the pleadings  
3     indicates that there has to be some factual predicate for that  
4     in -- in the indictment itself. And here I would argue,  
5     frankly, that it's almost worse than an indictment that simply  
6     tracks the factual pleadings -- or the statutory language.

7             It would be like having an indictment of a -- people  
8     like to talk about the -- you know, a get-away driver being,  
9     you know, criminally liable for the acts of his bank-robbing  
10    co-conspirators. Fine. You know?

11            But this would be like having an indictment where the  
12    get-away driver is charged as a co-conspirator. And then the  
13    language talks about how he was an Uber driver, had never met  
14    the people who robbed the bank before, and had no idea what  
15    they had just done. I mean, that couldn't possibly make any  
16    sense in the indictment. And although this one is quite  
17    verbose, at 53 pages, it doesn't -- it's quantity over quality,  
18    and it doesn't -- it says nowhere anything about informing the  
19    corrupt criminal intent, or the knowing agreement that he is  
20    required to -- to have to conspire.

21            THE COURT: Well, it alleges in Count 33 that he  
22    engaged in a conspiracy and that he acted with corrupt intent;  
23    does it not?

24            MR. IRVING: It says that. And that's the tracking of  
25    the statutory language, but then when -- it incorporates all of

1 the facts that are, you know, alleged in the earlier  
2 paragraphs, pages. And nowhere in there does it explain  
3 that -- does it offer any evidence or -- or even argument  
4 or -- on its face that he was aware of a subpoena.

5 So it's like conspiring to go to the grocery store. I  
6 mean, if he doesn't -- if he is not aware of any kind of  
7 criminal intent, even assuming on the four corners of the  
8 indictment, obviously, that, you know -- obviously, these are  
9 all contested facts, but this isn't the time and place for  
10 that; I get that. But, you know, although it tracks the  
11 statutory language, like I said before, it's almost worse than  
12 simply tracking the statutory language. It tracks the  
13 statutory language and then provides facts that don't support  
14 what it then says in the tracking of the statutory language.

15 THE COURT: Well, so I'm looking at Count 33. It has a  
16 series of phrases citing provisions in 1512, of course, with  
17 that corrupt language. And then it has paragraph 96, which  
18 states that the purpose of the conspiracy was for Trump to keep  
19 classified documents he had taken with him from the White House  
20 and to hide and conceal them from a federal grand jury.

21 It then sets forth the means and manner of the  
22 conspiracy, offering A through G, all with a final citation to  
23 Section 1512(k). So I guess, what exactly, if you could  
24 pinpoint, is missing, in your view?

25 MR. IRVING: Well, in my view, for starters, the manner



1 and means of the conspiracy that you point out, Your Honor, in  
2 paragraph 97 has a, you know, fairly long list of items.

3 It's -- it's unclear to us, and I think ought to be, at a  
4 minimum, the subject of a bill of particulars as to which of  
5 these the government is alleging Mr. De Oliveira engaged in.

6 Obviously, the last one, G, you know, is reflected in  
7 Counts 40 and 41. But the making of false statements -- I  
8 don't want to get surprised at trial that somehow the making of  
9 the false statements, in a time period that's well beyond the  
10 time period of the conspiracy, is somehow an act in furtherance  
11 of the conspiracy; I think the government needs to explain  
12 that.

13 You know, I want to make sure that, you know, that  
14 they're not arguing and don't intend to argue that the moving  
15 of the boxes as referenced in, you know, item (b) at least,  
16 you know, had anything to do with Mr. De Oliveira.

17 THE COURT: So, to your understanding at this point,  
18 although I know you have indicated you're seeking more clarity,  
19 it appears that only Subsection (g) of the manner and means of  
20 Count 33, at least, implicates Mr. De Oliveira?

21 MR. IRVING: Well, it reflects -- no, I wouldn't say  
22 that, Your Honor. I -- I -- I don't want to play games either,  
23 right? I mean, it's obviously what -- what's reflected in  
24 Counts 40 and 41. But those counts, and this language here,  
25 also totally fails to suggest even, that Mr. De Oliveira had

1 any idea that there was an investigation, had any idea that  
2 there was a subpoena. And Counts 40 and 41 discuss more -- in  
3 more detail what was actually happening, and being -- and what  
4 the colloquy was between Mr. De Oliveira and witness number  
5 whatever -- I can't remember at this point -- where he  
6 allegedly asked how the video system worked, how long video was  
7 stored for, and then stated that the boss wants it deleted  
8 (indicating). Right?

9 So, first of all, none of those are requests or  
10 demands. And it wouldn't be criminal in any event, absent some  
11 sort of knowledge that there was a subpoena or that  
12 this -- that -- it's impossible to obstruct an investigation  
13 you know nothing about. So --

14 THE COURT: Okay. So I think what I have heard is that  
15 it's missing, in your view, an allegation that Mr. De Oliveira  
16 knew of an official proceeding?

17 MR. IRVING: Counts 40 and -- 40 and 41 are missing  
18 that. And then by -- if that's all getting wrapped up into  
19 Count 33, it suffers the same infirmity. There are no facts  
20 alleged that would -- that could possibly support the required  
21 corrupt and knowing -- corrupt mens rea and knowing agreement.  
22 It's just simply not there.

23 THE COURT: But, again, just looking through the list  
24 of (a) through (g), what is your understanding of which of  
25 those letters applies to Mr. De Oliveira, understanding, of

1 course, that conspirators don't need to be involved in each and  
2 every component of the conspiracy?

3 MR. IRVING: No, they don't, Your Honor. But they do  
4 need to have the proper mens rea, and they need to knowingly  
5 agree with the object of the conspiracy, which also makes no  
6 sense.

7 But to answer the Court's question, I -- I mean,  
8 probably a better question for the government, but I am  
9 assuming that the government believes that subparagraph (g),  
10 attempting to delete security camera footage from the  
11 Mar-a-Lago Club to conceal the footage from the FBI and the  
12 grand jury, would -- would apply to Mr. De Oliveira.

13 But, again, you know, it's the -- it's the -- "to  
14 conceal the footage from the FBI and the grand jury"  
15 that -- none of the factual discussion in this 53 pages of  
16 rambling superseding indictment says anything about  
17 Mr. De Oliveira's understanding that anything was ever going to  
18 be submitted to either the FBI or the grand jury, or had been  
19 subpoenaed or that there was an investigation at all.

20 And I think if they had those facts, they certainly  
21 would have put them in here.

22 THE COURT: So just with respect to your request for a  
23 bill of particulars, if the Court were to entertain that  
24 request -- and, again, it's still up for discussion --

25 MR. IRVING: Sure.

1 THE COURT: -- what specific allegation with respect to  
2 mens rea do you think would be necessary for you to have  
3 sufficient information to prepare a defense?

4 MR. IRVING: I would like to know, what is  
5 their -- what are they alleging Mr. De Oliveira did or said  
6 that reflects any knowledge on his -- or anybody else that  
7 reflects any knowledge on his part that there was anything to  
8 obstruct in the first place?

9 THE COURT: Okay. Anything further you wish to add on  
10 Count 33?

11 MR. IRVING: No, Your Honor. I'm happy to proceed  
12 to -- I think we've already talked about 40 and 41, but I would  
13 be happy to answer any questions on those. I was going to move  
14 to the false statements.

15 THE COURT: What's your understanding of the difference  
16 between Count 40 and Count 41, factually?

17 MR. IRVING: I'm not sure -- I'm not sure I -- I --

18 THE COURT: So just looking at the language in  
19 Count 40 --

20 MR. IRVING: Right.

21 THE COURT: -- versus the language in Count 41, one  
22 refers to knowing -- knowingly corruptly persuading another  
23 person to conceal an object with intent to impair the object's  
24 integrity and availability for use in an official proceeding.  
25 And then it refers to a request by all three individuals made

1 to Trump Employee 4 to delete security camera footage.

2 And then Count 41 refers to those same three  
3 individuals requesting that the same employee delete security  
4 camera footage. I'm just trying to understand -- and I will  
5 ask the Special Counsel if they can just clarify the coverage  
6 for each of these counts as they overlap potentially.

7 MR. IRVING: Yeah, I -- I mean, I -- again, that's  
8 probably a better question for them. But I -- as a practical  
9 matter, I don't see much difference between the two. I realize  
10 that, obviously, one is pleading the language of (b) (2) (B) and  
11 the other is pleading the language of (c) (1).

12 You know, one talks about persuading and attempting to  
13 persuade. The other talks about actually doing, altering,  
14 destroying, blah-blah-blah, concealing. So --

15 THE COURT: Okay. All right.

16 Now, then, getting to the 1001.

17 MR. IRVING: Right.

18 THE COURT: You have indicated that you don't have  
19 enough specificity to understand what the alleged false  
20 statement is. Can you elaborate on your argument?

21 Because the indictment does contain a substantial  
22 excerpt from the recorded interview with -- underlined in bold,  
23 and then a subsequent paragraph 120.

24 MR. IRVING: Yes, Your Honor.

25 So, first of all, the indictment leaves out a section

1 of that colloquy that includes some explanation as -- in the  
2 public setting. I'm not going to get into it, but --

3 THE COURT: You have the full recorded transcript?

4 MR. IRVING: I have that excerpt here.

5 THE COURT: No. But in discovery, have you been  
6 provided with a copy -- a full copy of the recorded interview?

7 MR. IRVING: Oh, yes.

8 THE COURT: Okay. Please continue.

9 MR. IRVING: So it -- it leaves that out. It doesn't  
10 address Mr. De Oliveira's direct answers to questions about the  
11 actual boxes and things that they were asking him about that  
12 are the subject of all of this.

13 And then it -- you know, there is this rambling,  
14 you know -- I -- I quoted in the -- you know, in the pleading  
15 it essentially says -- these are questions about boxes that  
16 arrived at Mar-a-Lago. "Do you -- were you -- do you  
17 even -- like, or were you even there or aware of boxes that,  
18 like, all the stuff was moved in? Even, like, his personal  
19 stuff, his clothes, furniture, nothing" -- I mean, it doesn't  
20 make any -- and regardless of what his answers to those  
21 questions were, it's hard to imagine what possible relevance  
22 that might have had to an investigation two years later about  
23 boxes that the government has explained have been moved  
24 repeatedly, which brings us to the magic box problem, but I'm  
25 not sure if the Court wants me to get into that, where you have

1 64 boxes being moved out and 30 being moved back in, and 75  
2 being, you know, identified later during the search warrant.

3 I mean, there is plenty of weird going on here, but --

4 THE COURT: Well, I'm not familiar with the magic box  
5 problem. I don't know if it's been briefed that way.

6 But in any case, let's just take this in an organized  
7 fashion. Number 1 --

8 MR. IRVING: Sure.

9 THE COURT: -- why do you believe there is insufficient  
10 specificity as to what particular alleged false statements are  
11 the subject of Count 42?

12 MR. IRVING: Well, I'm taking the position, Your Honor,  
13 that nothing in here is a lie. So if there's --

14 THE COURT: So why wouldn't that just be a trial  
15 argument?

16 MR. IRVING: Because on its face, the indictment is not  
17 alleging that he -- that he, A, said anything that was false,  
18 and B, how -- how that could have possibly been material.

19 I mean, this is -- this is broken, you know, babbling  
20 question and answer about -- and it's -- again, Your Honor,  
21 it's the government's obligation. It's the FBI's obligation to  
22 nail him down and make sure that we all understand what boxes  
23 we're talking about; right? We understand what we're talking  
24 about.

25 We're not talking about, you know, "personal stuff and,

1 like, clothes and, like, you know, furniture." You know, I  
2 mean -- if that was going to be the basis for a 1001 charge,  
3 they had the obligation to nail him down. It's not  
4 Mr. De Oliveira's obligation to figure out what they're trying  
5 to ask him.

6 So I would take the position, Your Honor, that the  
7 count simply fails to state a 1001 violation. And if there is  
8 something I'm missing, that, I guess -- some other language  
9 that's not in the transcript or elsewhere about this, that  
10 would add up to a false statement that is material, I would be  
11 happy to answer.

12 THE COURT: Okay. So I think we've talked about  
13 the -- the specificity of the statements. But what is your  
14 argument on materiality? Because the government indicates in  
15 its opposition that it would have been material to their  
16 investigation for purposes of, I think, understanding where the  
17 boxes were stored, for what period of time, and that sort of  
18 thing.

19 MR. IRVING: Understood, Your Honor.

20 But, first of all, it's almost impossible to tell what  
21 they're talking about in this colloquy. So which boxes are we  
22 talking about is -- you know, is it furniture? Personal  
23 clothes? Who cares?

24 I mean, the questions -- the moving of the boxes that  
25 we're talking about in Count 42 are the movements from right



1 after the president left the White House and went to  
2 Mar-a-Lago. So I'm sure that there was lots of stuff that went  
3 into Mar-a-Lago. I'm sure there is lots of clothing and  
4 furniture that went into Mar-a-Lago.

5 How could that possibly be relevant to anything? And  
6 the indictment itself explains, and so does all the discovery,  
7 you know, all of the different types of stuff that went into  
8 Mar-a-Lago, and, you know, the fact that -- the actual boxes  
9 that the government cares about were moved several times before  
10 Mr. De Oliveira was interviewed in January of 2023, two years  
11 later.

12 So it -- I'm having a tough time trying to figure out  
13 how whatever Mr. De Oliveira said, even assuming it's the boxes  
14 that matter, how that could possibly have been relevant or  
15 material two years later.

16 THE COURT: Okay. All right.

17 Anything further on your motion?

18 MR. IRVING: No, Your Honor. Thank you.

19 THE COURT: All right. Mr. Harbach? Mr. Bratt? Which  
20 of you will be tackling this opposition?

21 MR. BRATT: I will, Your Honor.

22 THE COURT: Okay. Thank you. And I will hear from the  
23 Special Counsel, please.

24 MR. BRATT: Just at the outset, I think it's important  
25 to recognize that the superseding indictment goes well beyond

1 the requirements of Rule 7(c) with respect to the obstruction  
2 counts, aside from tracking the statutory language. Over the  
3 course of more than 30 paragraphs, it details the conduct that  
4 the government alleges underlies those accounts -- those  
5 counts, the obstruction count and -- the conspiracy count and  
6 the obstruction count.

7 As to -- excuse me -- the false statement count, yes, I  
8 could also chop it up as they do in the brief, and as  
9 Mr. Irving just did here, and make it sound nonsensical, but I  
10 think the Court has caught on and recognized that the -- as  
11 it's pled in the indictment, that the questions are laid out,  
12 it is alleged that the bolded answers are false. It is alleged  
13 that they are material, and that is sufficient on the face of  
14 the indictment.

15 As I think the Court was indicating, a lot of the  
16 arguments that Mr. Irving is making are jury arguments.  
17 They're arguments he may make to the Court as part of a Rule 29  
18 motion, but it does nothing to undermine the sufficiency of the  
19 charged -- the charged false statement.

20 THE COURT: Okay. If we could start with 33, Count 33.

21 MR. BRATT: Yes.

22 THE COURT: And then we will get to the false statement  
23 count.

24 MR. BRATT: Sure.

25 So with respect to Count 33. One -- again, I think the

1 Court acknowledged or steered Mr. Irving toward the fact that  
2 his argument, as to Mr. -- whether or not Mr. De Oliveira was a  
3 participant in all aspects of it is inconsistent with  
4 conspiracy law. We --

5 THE COURT: Well, I don't think he is taking the  
6 position that his client needs to have done every single thing  
7 listed in the manner and means. I think he is just indicating  
8 which of the options goes to him. More specifically, is it F  
9 and G, or just G?

10 And -- or maybe it's A, B, C, D, or E, which it doesn't  
11 appear to be the case.

12 MR. BRATT: Well, he has some involvement in the  
13 movement of the boxes. So that part of that also -- also  
14 refers to him.

15 But, again, I think the key question, both for the  
16 sufficiency of the indictment, and for the argument for a bill  
17 of particulars, is: What is in the indictment itself? What is  
18 alleged in the indictment?

19 You know, paragraphs 74 through 87 detail  
20 Mr. De Oliveira's conduct with respect to the obstruction that  
21 occurred as to the video footage. That is all out there for  
22 him. He has extensive discovery --

23 THE COURT: So can you just specify, looking at A  
24 through G, with any corresponding allegations in the remainder  
25 of the superseding indictment?

1 MR. BRATT: So I -- if the Court is asking me to give a  
2 bill of particulars now, I just want to be bound by what I say.  
3 So certainly G -- G -- G refers to him. He is -- or I should  
4 say he is encompassed by the allegation in G.

5 THE COURT: The false statement, could it be included  
6 in Count 33, given the time frame?

7 MR. BRATT: No, it cannot.

8 THE COURT: Okay. And then -- but you said "moving  
9 boxes." So that would be --

10 MR. BRATT: B.

11 THE COURT: -- B?

12 MR. BRATT: Correct. And G.

13 But, again, I -- I'm a little uncomfortable being in a  
14 position where --

15 THE COURT: Why would you be uncomfortable just simply  
16 identifying paragraphs in a public superseding indictment that  
17 tied in Mr. De Oliveira --

18 MR. BRATT: So I have, and what I just want to make  
19 sure is, you know, as we go forward, we don't know what other  
20 evidence may come about, what other witnesses may come about.  
21 So --

22 THE COURT: That's fair.

23 But standing here, looking at the four corners of the  
24 superseding indictment, I just wanted to get some clarity that  
25 it is -- that it is, in fact, G, it's not F, and that

1 it's -- and then it's B.

2 Which paragraphs would you say connect Mr. De Oliveira  
3 to the movement of boxes?

4 MR. BRATT: So that portion is what immediately  
5 precedes paragraph 74 to 87. I believe that begins -- part of  
6 that begins at paragraph 53. And --

7 THE COURT: 53. Okay.

8 MR. BRATT: -- he is involved in some of the -- not  
9 each of the paragraphs that follow between 53 and 74, but he is  
10 involved in those paragraphs.

11 THE COURT: Because I've gone through them, and I've  
12 just tried to focus in, given that this is a motion brought by  
13 Mr. De Oliveira to see which allegations are specific to him.  
14 So can you assist me with that?

15 MR. BRATT: So for now, or for these purposes,  
16 Your Honor, I would focus on the paragraphs in which he is  
17 named.

18 THE COURT: So 62, concerns the movement of  
19 approximately 30 boxes?

20 MR. BRATT: That's correct.

21 THE COURT: Okay.

22 MR. BRATT: And he is also involved in 63.

23 THE COURT: Okay. All right. Now, what is your  
24 argument on this allegation or absence of an allegation that  
25 Mr. De Oliveira knew of an official proceeding?

1 MR. BRATT: Well, I don't see how there is an absence  
2 of that. If you look at the statutory language, what he is  
3 being charged with having corruptly persuaded or corruptly  
4 interfered with the various formulations that are in 1512, what  
5 he is being charged with having -- having acted  
6 toward -- toward obstructing is an official proceeding.

7 And we cited in our opposition brief the Friske case  
8 from the Eleventh Circuit, and certainly, we have to prove that  
9 he was aware of an official proceeding. We do not have to  
10 prove, and he cites no case saying that we have to prove that  
11 he knew the details of the subpoena, that he knew what the  
12 parties' obligations are with respect to a subpoena, that he  
13 had to know -- know what the recipient's preservation  
14 obligations were with respect to a subpoena.

15 What we have to show is that he had knowledge of an  
16 official proceeding, and that is encompassed in the mens rea in  
17 the obstruction counts.

18 THE COURT: Okay. So you agree that you have to prove  
19 per Friske or "Friske" -- I'm not sure how to say that -- that  
20 he had knowledge of a -- of an official proceeding?

21 MR. BRATT: That's correct.

22 THE COURT: Okay. But you would agree that the  
23 indictment doesn't expressly indicate that he had that  
24 knowledge, except to the extent it generally refers to the  
25 statutory language in 1512?

1           MR. BRATT: So it doesn't, but I also think it's  
2   important to compare this superseding indictment with the  
3   superseding indictment in the lead case that they cite in their  
4   motion, which is the Eleventh Circuit's decision in McGarity.  
5   And I'm sure the Court's familiar with McGarity.

6           Just to quickly summarize it. That was a wide-ranging  
7   prosecution against over a dozen people for being involved in a  
8   ring that shared hundreds of thousands of child pornographic  
9   images, and the defendants were principally convicted of  
10   engaging in a -- in a CEE.

11           And there was a single, one-paragraph-long count  
12   charging obstruction, and it just said that they engaged in  
13   some form of 1512 and in CEE being a continuing exploitation  
14   enterprise. And the Eleventh Circuit found that that was  
15   inadequate because under the facts of that case, there -- the  
16   case began with an Australian investigation. Then the  
17   Australians began working jointly with the FBI. And then the  
18   United Kingdom began to be involved.

19           And the Eleventh Circuit found that there was not  
20   sufficient notice in that indictment as to the -- as to the --  
21   the proceeding itself that was the foundation for the  
22   obstruction counts.

23           By contrast here, you have paragraph 50 that talks  
24   about the narrow referral. Immediately after that, paragraphs  
25   51 and 52 of the superseding indictment. It gives the dates,

1 after receipt of the referral, when the FBI began its  
2 investigation and when the grand jury began its investigation.

3 There is then the paragraphs that we have been  
4 referring to, as to all of the -- all of the activity that he  
5 and others engaged in in support of this conspiracy and the  
6 obstructive acts.

7 It cannot be any clearer what the investigation and the  
8 official proceedings were that Mr. De Oliveira is charged with  
9 having -- having obstructed. And lest there be any question  
10 remaining as to what that proceeding -- what those proceedings  
11 were, he has, through discovery, all of the information that  
12 the government's provided.

13 He has the two subpoenas -- and those subpoenas have  
14 been made public -- that are the foundation of the obstruction  
15 counts: The May 11th subpoena for documents with class- --  
16 May 11, 2022, subpoena for documents bearing classification  
17 markings; and the June 24th, 2022, subpoena for video footage.

18 All the grand jury transcripts that he has received  
19 that span this -- this period of time, they're all from the  
20 District of Columbia grand jury.

21 THE COURT: So if -- if you were looking through the  
22 indictment for an allegation that Mr. De Oliveira had knowledge  
23 of the official proceeding, the grand jury that we're referring  
24 to, where would you find that?

25 MR. BRATT: You would find that in what I -- what I



1 just described, Your Honor. You would define it -- find it in,  
2 really, paragraphs 50 through 87. You would find it in the  
3 discovery that he has.

4 THE COURT: You are giving me broad range paragraphs.

5 Which allegation in this superseding indictment  
6 actually says that Mr. De Oliveira had knowledge of the  
7 official proceeding?

8 MR. BRATT: That is in the language in Counts 33 and  
9 the other obstruction counts. You cannot have the mens rea to  
10 obstruct an official proceeding if you don't know that there is  
11 an official proceeding.

12 THE COURT: So, okay, I still haven't heard where in  
13 this indictment -- I'm happy to go to whichever paragraph you  
14 direct me to.

15 MR. BRATT: It's paragraph 95, where we lay out the  
16 statutory language.

17 THE COURT: Okay. So it's the recitation of the  
18 statutory language.

19 MR. BRATT: Yes, yes.

20 THE COURT: That's it? Okay.

21 MR. BRATT: And you cannot read that language  
22 that -- without -- and satisfy the mens rea without having  
23 knowledge of the -- of an official proceeding.

24 THE COURT: Okay. Now, with respect to the term  
25 "corruptly," and this will probably come up in the other

1 motions set for argument today, but what is your definition of  
2 "corruptly"?

3 MR. BRATT: So I am going to refer to Mr. Harbach, but  
4 it's the Eleventh Circuit definition that we have previously  
5 given the Court.

6 THE COURT: Okay. Which is?

7 MR. BRATT: Which is --

8 THE COURT: Or I'm happy to -- if Mr. Harbach is going  
9 to cover this, then --

10 MR. BRATT: I don't want to mangle it. So --

11 THE COURT: Okay. All right. That's fine then.

12 Now let's turn away from Count 33 and discuss my  
13 questions earlier regarding the distinction between Counts 40  
14 and 41. Can you -- can you answer the same question that I  
15 posed of Mr. Irving?

16 MR. BRATT: Well, I -- I think I can give the same  
17 answer that Mr. Irving gave. This may be a rare area where we  
18 are in agreement. It charges different prongs of 1512.

19 THE COURT: Factually, what's different?

20 MR. BRATT: Factually, it's the -- essentially, the  
21 same context -- both --

22 THE COURT: Okay. That's what I was curious.

23 MR. BRATT: -- both allegations, yes.

24 THE COURT: Factually, the same conduct, but just  
25 invoking different provisions of 1512.

1 MR. BRATT: Different ways of violating the statute.

2 THE COURT: Okay.

3 Okay. So then getting to the false statement, the  
4 final count, 42. Looking at the excerpt of the interview  
5 provided and then looking at paragraph 120, what exactly, if  
6 you had to pinpoint, is the false statement or false  
7 statements, plural?

8 MR. BRATT: So --

9 THE COURT: In other words, he said "blank," but he  
10 knew "blank" was false because why?

11 MR. BRATT: So it is alleged that he was asked a  
12 question -- and I should add, he knows from discovery, as he  
13 said -- they have the full transcript -- that the agents told  
14 them why they were asking these questions. That they were  
15 interested in the location movement of boxes at -- at  
16 Mar-a-Lago.

17 So he is first asked a question: At the end of the  
18 presidency, was he part of any group that helped move boxes or  
19 unload them when they arrived? That's the -- sort of the  
20 first, at the bottom of page 51, to the top of page 52, before  
21 the three asterisks.

22 THE COURT: So, just stopping there for a minute, the  
23 statement is: "I was not involved. I was not part of any  
24 group" --

25 MR. BRATT: "That unloaded and moved boxes" --

1 THE COURT: Okay.

2 MR. BRATT: -- "at the end of the presidency."

3 THE COURT: "I was not part of any group that unloaded  
4 or moved boxes."

5 You said, "at the end of the presidency," is that --

6 MR. BRATT: The question begins --

7 THE COURT: I don't have the full interview; so I'm  
8 just looking at the superseding indictment.

9 MR. BRATT: Right, right. And for purposes of the  
10 motion, that's all we -- we -- we can be looking at.

11 THE COURT: Right.

12 MR. BRATT: But, again, the question is: "When, after  
13 the end of the presidency, boxes arrived to Mar-a-Lago, were  
14 you part of any group to help" --

15 He interrupts, "No."

16 -- "and unload and move them?"

17 THE COURT: Okay. So stopping there.

18 He says: "I was not part of any group" -- allegedly.

19 Again, these are all allegations; I should make that clear.

20 But "that unloaded or moved boxes after the end of the  
21 presidency."

22 And the answer is "no."

23 MR. BRATT: Correct.

24 THE COURT: Okay. And so the falsity there is that he  
25 was, in fact, according to the Special Counsel, involved or

1 part of a group that moved boxes at the end of the presidency?

2 MR. BRATT: That's correct.

3 THE COURT: Okay.

4 MR. BRATT: And as they know from discovery, there are  
5 photographs reflecting that.

6 THE COURT: Of the movement?

7 MR. BRATT: Of him being part of the people moving the  
8 boxes, correct --

9 THE COURT: Okay.

10 MR. BRATT: -- with the boxes.

11 THE COURT: Now when you say "the boxes," is there any  
12 understanding of which set of boxes? I know that there is a  
13 lot of briefing about which boxes. We start with X number. It  
14 then whittles down to another number. I know in the special  
15 master litigation there was an inventory of, I believe, 33  
16 items/boxes or containers.

17 In this Q and A, is there any reference to which boxes?

18 MR. BRATT: No. It is part of the efforts to  
19 understand the movement of the boxes. So the main resting  
20 place of the boxes that arrived from the White House at the end  
21 of Former President Trump's administration, particularly boxes  
22 that were transported on Air Force One on January 20, 2021, but  
23 other boxes --

24 THE COURT: Can you stop there for just one moment --

25 MR. BRATT: Yeah.

1 THE COURT: -- in the terms of the chronology? Because  
2 the indictment references that -- I just had a question about  
3 the timing. One moment. Yes. It's paragraph 4: "That as he  
4 departed the White House" --

5 MR. BRATT: Correct.

6 THE COURT: -- "caused scores of boxes" -- was -- is it  
7 alleged in this indictment that all of the boxes that are the  
8 subject of the indictment were delivered on January 20th? Or  
9 were there other delivery dates associated with the boxes?

10 MR. BRATT: So as a factual matter, there were other  
11 delivery dates. There were some boxes that arrived on -- in  
12 moving vans.

13 THE COURT: Prior to the 20th?

14 MR. BRATT: I'm not -- I forget exactly which day they  
15 arrived. They're all right around the 20th.

16 THE COURT: Okay.

17 Okay. So getting back to what you were mentioning  
18 earlier, we're talking now about the Q and A for Count 42 and  
19 trying to understand which boxes are the subject of that  
20 recorded interview.

21 MR. BRATT: Correct.

22 So there were boxes that arrived on January 20th, 2021.  
23 They were on Air Force One. They were unloaded at Palm Beach  
24 International Airport. They were loaded into SUVs that came  
25 from Mar-a-Lago, and they were transported to Mar-a-Lago. And

1 the bulk of them ended up on the stage in the White & Gold  
2 Ballroom -- of those boxes that arrived. And we allege that  
3 his answers and unawareness of those boxes were false.

4 THE COURT: Okay. All right. Now can you address the  
5 materiality argument?

6 MR. BRATT: Yes. Well, again, it is alleged that they  
7 were material. And they know from -- and part of our proof  
8 would be that when he was interviewed, he was advised as to the  
9 interest that the agents had in the subject matter about which  
10 they were questioning him.

11 And we can either -- the Court will give an instruction  
12 on -- on materiality, and we will either be able to meet that  
13 burden, or we won't meet that burden. Or maybe he will be able  
14 to convince you at the Rule 29 stage that we haven't met that  
15 burden. But for purposes of a motion to dismiss the  
16 indictment, what we have alleged is more than sufficient.

17 THE COURT: But it's correct that the arguments on  
18 materiality are reflected in your opposition at 372, page 14?

19 MR. BRATT: Yes.

20 THE COURT: Okay. Are you aware of any case law that  
21 would discuss the need to further specify why a false statement  
22 is material other than just saying it's material?

23 MR. BRATT: No. And, in fact -- I know you did not  
24 engage with Mr. Irving about his arguments on bill of  
25 particulars, but that is the -- the exact type of question that

1 the Eleventh Circuit said is not appropriate for a bill of  
2 particulars. For us to --

3 THE COURT: I ask only because, for example, in white  
4 collar cases, oftentimes the indictments say, "Well, it's  
5 material because if we had known about the lie, we wouldn't  
6 have paid out the money," or something along those lines.

7 And I'm just curious whether something comparable would  
8 be included in this type of charge.

9 MR. BRATT: I'm not aware of any Eleventh Circuit  
10 authority, and I haven't seen any in their briefing.

11 THE COURT: Okay. All right.

12 Anything further, Mr. Bratt?

13 MR. BRATT: Not unless you have questions about his  
14 specific bill of particulars request. But I think a lot of the  
15 same principles are going to come up in Mr. Nauta's argument.

16 THE COURT: All right. Well, then, let's  
17 just -- turning to the bill of particulars, I understand your  
18 position to be that none of the requested information is  
19 something the government would be in a position to provide in  
20 the form of a bill of particulars; is that right?

21 MR. BRATT: Right. And I think there are three  
22 overarching points, and this way it applies to both motions.  
23 The first is that the bill of particulars is not appropriate  
24 when an indictment, one, is very detailed, as this one is, and  
25 two, where discovery has been extensive, as it has been here.



1 That's really black letter --

2 THE COURT: But, for example, on the official  
3 proceeding, it's clear that the indictment doesn't -- other  
4 than tracking the statutory language, doesn't allege that he  
5 knew of the existence of an official proceeding. I think we've  
6 talked about how paragraph 95 is -- I would appreciate no  
7 sarcasm.

8 So --

9 MR. BRATT: I didn't --

10 THE COURT: Given that -- given that, what I'm trying  
11 to understand is: Because the indictment doesn't contain a  
12 specific allegation about his knowledge of the official  
13 proceeding, then why would the Special Counsel be opposed to  
14 providing a bill of particulars, at least with respect to that  
15 one discrete point, which is just governing the official  
16 proceeding?

17 MR. BRATT: So two things. One -- and I wasn't going  
18 to say something sarcastic; I would never do that, Your Honor.

19 But our argument is, if you look at the plain language,  
20 both in the statute and what we allege, "with intent to impair  
21 the object's integrity and availability for use in an official  
22 proceeding," that is alleging that he has to be aware of an  
23 official proceeding. And -- so that's the first part, that we  
24 have alleged it and we have properly alleged it.

25 The second part of my answer is that -- what he is

1 asking us to do in the bill of particulars. And when a  
2 particular -- a bill of particulars begins with why or how, he  
3 is asking us to give our theory of the case. He is asking us  
4 to set out the facts and -- both direct and circumstantial --  
5 that support the element that we have alleged, and that is not  
6 what the law requires.

7 And so to answer that question, essentially would be  
8 requiring us -- and this -- this holds true for many of the  
9 questions that -- that are in Defendant Nauta's motion that  
10 Mr. Woodward has argued. For us to do that would essentially  
11 be to give, at this stage, our closing summation. It would  
12 all -- be all of our arguments, marshalling all the proof, and  
13 saying this is --

14 THE COURT: But would it be just focusing on the  
15 knowledge piece on the official proceeding?

16 MR. BRATT: Yes. There are any number of facts that we  
17 can point to that show that Mr. De Oliveira and Mr. Nauta were  
18 aware of the official proceeding. We understand that's our  
19 burden, and they have -- they have all of the -- the -- the  
20 same evidence that we have. And we look at that evidence, and  
21 we plan to make particular arguments to the jury and, at the  
22 proper stage, to the Court.

23 But we do not have to give those arguments now in  
24 response to a bill of particulars. That runs directly squarely  
25 in the face of what the Eleventh Circuit has held.

1 THE COURT: Okay. All right. Thank you.

2 Anything further, Mr. De Oliveira, on your particular  
3 motion?

4 MR. IRVING: If I may just briefly.

5 Your Honor, just on that -- on that last point, I  
6 understand that the law doesn't, you know -- the government  
7 quoted cases that discuss how they don't have to, you know,  
8 give up all their theories of the case and whatnot at this  
9 stage, but we are getting kind of late in the game here. If  
10 the government doesn't understand and -- and can't explain what  
11 facts there are to suggest that Mr. De Oliveira had any  
12 knowledge of an official proceeding anywhere or investigation  
13 or --

14 THE COURT: Well, I think they said that that they do  
15 have all of that, that it's in the discovery, and that it's  
16 part of their case. So it's in the facts; it's just not more  
17 specifically alleged beyond tracking the statutory language.

18 MR. IRVING: Understood, Your Honor. I -- I just -- I  
19 don't think it's too much to ask that they -- that they  
20 articulate that in a -- in a situation where -- as I said  
21 before, yes, they tracked the statutory language, but then they  
22 have this -- you know, pages and pages of rambling superseding  
23 indictment that say nowhere anything about the fact.

24 So I will leave that at that.

25 THE COURT: Do you have any authority that would

1 suggest that a more specific allegation of materiality is  
2 necessary, other than what's been achieved here, which is a  
3 reference to the statutory term?

4 MR. IRVING: Are we talking about the false statement  
5 or the --

6 THE COURT: The false statement, yes.

7 MR. IRVING: I don't know -- I don't have a case to  
8 give you at the moment.

9 THE COURT: Okay. All right. Then, thank you.

10 MR. IRVING: Thank you.

11 THE COURT: I think that concludes the Court's  
12 argument -- hearing of argument on your motion, Mr. Irving.

13 MR. IRVING: Thank you.

14 THE COURT: So with that, let me turn to Mr. Woodward  
15 or whoever will be addressing the two remaining motions.

16 MR. WOODWARD: Thank you, Your Honor.

17 I also just wanted to thank the Court for setting the  
18 hearing today. I didn't put in the -- in the public filing,  
19 but I don't mind saying here that we're headed home tonight and  
20 back down to Disney World tomorrow with the family. So I  
21 really appreciate both the Court and the Special Counsel's  
22 office not objecting to that request.

23 So two motions. But as the Court, I think, has  
24 observed, they're somewhat -- they're somewhat related, both to  
25 each other and to Mr. De Oliveira's motion. And so I will

1 start first with the vagueness argument because that will tie  
2 into the significance. Whether the Court grants that or  
3 whether the Court concludes -- you know, we can read the  
4 writing on the wall that this is a jury instruction issue, it  
5 will then tie into the significance of the second request.

6 And the vagueness argument focuses on the use of the  
7 phrase "corruptly." "Corruptly" is found in 1512 and its  
8 sister statutes. It's found throughout each of the charges  
9 that are alleged as against Mr. Nauta with respect to  
10 obstruction.

11 And while we appreciate -- we appreciate the Special  
12 Counsel's position that the Eleventh Circuit has at least  
13 accepted one definition of "corruptly," we take issue with the  
14 fact that this Court would be bound by Friske -- or Friske and  
15 its holding.

16 Frankly, vagueness wasn't the issue before the Court.  
17 And so what we have here is a term that the Special Counsel's  
18 office and this Court has required to conclude Mr. Nauta is on  
19 notice of; otherwise, we have a due process concern. And as  
20 the Court just went through in some detail, it's not clear how  
21 Mr. Nauta knew about the official proceeding that was -- that  
22 was going on, and certainly the indictment doesn't make that  
23 clear. And as a result, the use of these statutes and the use  
24 the phrase "corruptly" as applied to Mr. Nauta is  
25 unconstitutional insofar as he's not put on notice of what

1 "corruptly" means.

2 And, you know, really --

3 THE COURT: So, I guess, what definition do you think  
4 applies to the term "corruptly"?

5 MR. WOODWARD: Well, we would argue that Justice Scalia  
6 presciently addressed this issue when he opined, albeit in a  
7 concurring opinion, that -- excuse me -- in -- concurring in  
8 part and dissenting in part -- that for one to act corruptly,  
9 there must have been -- there must be proof that they had a  
10 pecuniary benefit in their actions.

11 And I'm citing, of course, to United States vs.  
12 Aguilar, 515US539.

13 THE COURT: I guess my question is: Even if you  
14 adopted, not a pecuniary test, but a benefit, you procure a  
15 benefit for yourself or someone else, wouldn't that still be  
16 alleged in this indictment because the purpose of the  
17 conspiracy, as stated in 96, alleges a purpose to help the  
18 former president keep classified documents he wanted to  
19 conceal?

20 MR. WOODWARD: No, because just as -- I'm going to  
21 respond to that in two ways, actually.

22 First, as the Special Counsel reminded me not long ago,  
23 there is only one conspiracy charge. And so all of the other  
24 uses of "corruptly" apply only to Mr. Nauta. And so what  
25 benefit did Mr. Nauta himself seek to obtain?

1           They've conceded that the only person benefitting from  
2   these acts was Former President Trump. Now, with respect to  
3   the conspiracy, what Justice Scalia explained is that there has  
4   to be a financial benefit. And there is no allegation in the  
5   indictment, nor is there any proof otherwise, but we're working  
6   with the indictment here, that Former President Trump stood to  
7   benefit financially from obstructing the proceeding --

8           THE COURT: But even the Fischer case that you cited,  
9   even that decision, assuming you agreed with the concurrence,  
10   even that concurrence, as it explains the "corruptly" element,  
11   does not require financial benefit, does it?

12          MR. WOODWARD: That's correct. It does not. In fact,  
13   it is the dissenting opinion in which a financial benefit is  
14   required, and it's the dissent that is referring back to  
15   Aguilar in Justice Scalia's discussion of -- and so when  
16   Your Honor says "any benefit at all," that is the concurring  
17   view.

18          And so what the -- I think it was Judge Walker wrote in  
19   his concurring opinion is that the benefit does not have to be  
20   financial; there just has to be a benefit. There has to be a  
21   specific benefit --

22          THE COURT: For yourself or for someone else?

23          And so that's my question, is: Why wouldn't  
24   paragraph 96 sufficiently address the "corruptly," even  
25   assuming your view of the definition is correct?

1 MR. WOODWARD: So paragraph 96 would  
2 address -- would -- might address "corruptly" with respect to  
3 the conspiracy charge, but it would not address it with respect  
4 to the charges as against -- no. I'm sorry, Your Honor.

5 "For yourself or someone else," that's not how the  
6 individual 1512 charges are laid out. It is for Mr. Nauta's  
7 benefit. And I think the Special Counsel's office  
8 recognizes -- I think they've conceded that they do not allege  
9 that Mr. Nauta stood to benefit from moving the boxes.

10 And so, as pleaded in the indictment, taking, again,  
11 apart -- taking -- setting aside the conspiracy charge, all of  
12 the other counts must fall because there is no benefit to  
13 Mr. Nauta under the Walker definition of "corruptly" in the  
14 Fischer decision.

15 And, in fact, that's why we think the Special Counsel  
16 is going to rely on the -- do you have a preference between  
17 "Friske" or "Friske"?

18 THE COURT: No.

19 MR. WOODWARD: Okay. I will go with "Friske" then.

20 I think that's why they're relying on that definition  
21 of "corruptly" in Friske, because it doesn't require any  
22 benefit to anyone at all. It just requires an improper motive.

23 And so if -- if the Court were to adopt the Walker  
24 concurrence in Fischer, then -- then the indictment has to  
25 fall. But let's take a step back --



1           THE COURT: It would be odd, right, to go beyond -- I  
2   mean, Friske, perhaps, didn't grapple with the definition in  
3   specific terms, but, nevertheless, laid out the elements of the  
4   cause of action and clearly states the "improper purpose"  
5   language, which is fairly customary, and then, I think, is  
6   picked up in other Eleventh Circuit cases. So it would be odd  
7   to stray from the improper purpose. And then, of course, you  
8   just pick up paragraph 96 as the alleged improper purpose.

9           MR. WOODWARD: Well, Your Honor, I think, respectfully,  
10   to my colleagues that defended clients in Friske and other  
11   cases, that the issue wasn't argued, doesn't mean that it  
12   wasn't an issue to be argued in those cases. I think  
13   Your Honor every day sees new arguments. That is sort of the  
14   nature of what we do.

15           And so, importantly, Friske does not preclude the Court  
16   from requiring more. And, again, we're getting into -- I can  
17   hear my colleague behind me saying "charging conference."  
18   We're getting into a discussion that might be more apt for a  
19   charging conference, when, really, the purpose of this motion  
20   is to make the point that there are multiple definitions of  
21   "corruptly," and as a result of the -- of multiple definitions  
22   of "corruptly," Mr. Nauta is not on notice of how his actions  
23   violated the statute. And that is why we have found ourselves  
24   in a situation where the -- those charges that require corrupt  
25   acts have to be dismissed as against Mr. Nauta. After all --

1           THE COURT: You're not aware, though, of any case that  
2     has actually dismissed a 1512 charge at the motion-to-dismiss  
3     stage because there are -- there is development in the law in  
4     the particular definition of the adverb "corruptly"?

5           MR. WOODWARD: Well, Fischer itself. Fischer itself is  
6     a dismissal of an indictment --

7           THE COURT: Right.

8           MR. WOODWARD: -- but it was appealed by the  
9     U.S. Attorney's Office.

10          THE COURT: Yes, but that concerned a different  
11     subsection of C, which is not involved here. Here we are  
12     dealing with an evidence impairment act, are we not? And so,  
13     although the mens rea was relevant to the D.C. Circuit in  
14     trying to understand whether that charge survived dismissal,  
15     how does that play out here where we're not dealing with  
16     anything other than an evidence impairment charge?

17          Does that -- in other words, we're not dealing  
18     with -- with an expansion of the actus reus, which is what is,  
19     you know, being heard by the Supreme Court in Fischer.

20          MR. WOODWARD: So that -- I agree that that is the --  
21     what the Supreme Court has said that they are focused on. I  
22     disagree with the Special Counsel's office that that is what  
23     Judge Nichols, the trial judge in Fischer, was considering.

24          And I will also observe that Fischer is a -- is a  
25     three -- there are three defendants, three separate cases:

1 Fischer, Miller, and Lang. And Judge Nichols was presented  
2 with a very robust argument about the flaws in 1512. And so,  
3 while the Court is correct that 1512(c)(2), which uses the also  
4 intriguing phrase, "otherwise," and that has been the focus of  
5 significant dispute, the "corruptly" actually applies both to  
6 1512(b) and 15 -- 1512(c)(1) and 1512(c)(2). That "corruptly"  
7 word is at -- is at the outset.

8 So the logic -- of course, none of this is binding on  
9 this Court. This is all, as I like to say, a far away  
10 district. But the logic is applicable here too.

11 And so Your Honor's question was: Am I aware of a  
12 Court granting a motion to dismiss because there is -- because  
13 there is varying interpretation of a statutory phrase?

14 And I want to make clear -- I said Fischer. That's not  
15 what happened in Fischer. It wasn't that the defendants in  
16 Fischer came to Judge Nichols and said, we now have this  
17 circuit split, for example.

18 So, no, I'm not aware of that. Candidly, I had not  
19 considered the question in that way, but I don't know that that  
20 precludes dismissal here. Because the reality is, what we have  
21 now, as we pointed out in our briefs, three different  
22 interpretations of "corruptly." And what the circuit said  
23 in -- in the -- Judge Pan said in her leading opinion is, it  
24 doesn't matter because any of these three definitions would  
25 apply to Mr. Fischer himself.

1           That's not true with respect to Mr. Nauta. And so,  
2   under the due -- under Mr. Nauta's due process rights, he is  
3   entitled to know which of those three definitions applies when  
4   he is indicted with these charges. And because we now cannot  
5   know that, the statute becomes vague.

6           THE COURT: But this confusion that you have indicated  
7   exists, doesn't really exist in the Eleventh Circuit. I mean,  
8   Friske and at least one other case pretty clearly adopts the  
9   improper purpose language, and it's fairly understood to be the  
10   definition. So why could -- why would that create such  
11   grievous ambiguity for purposes of someone trying to conform  
12   their conduct to the law?

13           MR. WOODWARD: Of course, we don't know why, again,  
14   defense counsel didn't -- didn't argue. Now, Friske is itself  
15   decided -- if the Court will forgive me -- in 2011; so some  
16   13 years ago. And none of these issues had bubbled up.

17           And, in fact, Justice Scalia's opinion is concurring in  
18   part and dissenting in part. And so we didn't have a scenario  
19   where -- where the definition of "corruptly" was -- was  
20   varying, but that's why we have these arguments, and that's why  
21   we bring these issues to trial courts' attention because the  
22   law does change.

23           And Mr. Nauta is now serving as a victim to that change  
24   because he doesn't know what the definition of "corruptly" will  
25   be when the Supreme Court is finished with it.

1           THE COURT: Do you think there is some dispute about  
2 whether the Supreme Court will even address the mens rea  
3 component in that case? It was included in the -- in the cert  
4 petition and in the merits briefing, but it's more of a  
5 secondary, subsidiary argument. So what's your position on  
6 whether guidance is really going to come from the -- from the  
7 Court on the term "corruptly"?

8           MR. WOODWARD: They certainly have indicated that --  
9 that it's not going to come. At the same token, the Supreme  
10 Court does what it wants. And it -- and it seems unlikely to  
11 me that they will ignore this "corruptly" issue. It has  
12 come -- it has presented itself in a number of ways now.

13           And I think, whether it's in the Fischer case -- or now  
14 that the Robertson decision has come down and called into  
15 question what the actual definition of "corruptly" is,  
16 this -- this law -- this litigation is going to continue for  
17 some time. I don't think the time --

18           THE COURT: But Robertson is at the end of the road,  
19 right? There is -- there is no pending litigation in that  
20 case?

21           MR. WOODWARD: I was going to say I don't know that the  
22 time has been exhausted for the Robertson Court -- for the  
23 Robertson defendant to seek en banc review. I don't think it  
24 has. I think that -- I think they can still seek en banc  
25 review, but I -- I won't ask the Court to quote me on that.

1 THE COURT: Okay.

2 MR. WOODWARD: And so -- and Robertson, you know, just  
3 further confuses -- again, we're not in D.C.; I appreciate  
4 that. And in the Eleventh Circuit -- the sort of plain-meaning  
5 definition of "corruptly" has been accepted, but I don't  
6 read -- we don't read Friske as requiring this Court to adopt  
7 the definition used in Friske; whereas, here, a defendant is  
8 arguing that it -- it should not, given the trend in the law  
9 with respect to "corruptly" and what a defendant need have been  
10 thinking when the alleged crimes were committed.

11 THE COURT: Okay. Anything further on your motion to  
12 dismiss beyond the "corruptly" definition?

13 MR. WOODWARD: No, Your Honor. I'm happy to transition  
14 to the boxes.

15 So we -- we hear the Special Counsel's office with  
16 respect to their obligation in an indictment. It is minimal.  
17 Rule 7 does not require a speaking indictment, but I do think  
18 that that's a fact of consequence in this particular case.

19 We have a speaking indictment. And although  
20 the -- their choice of bringing a speaking indictment does not,  
21 at this stage, change their -- their constitutional  
22 obligations, it is telling in what it does not say. Had they  
23 brought a nonspeaking indictment, had they simply alleged the  
24 elements of the offenses, we'd still be here, to be sure; we  
25 would still be here talking about a bill of particulars.

1           Why? Because a bill of particulars is a -- not a tool  
2   that -- that allows the Court to force the government to  
3   supersede the indictment. That's not what a bill of  
4   particulars is. Rather, a bill of particulars is a tool that  
5   allows a defendant to request, and for the Court to order the  
6   government to explain to a defendant how these charges operate.

7           Now, yes, the Special Counsel's office focuses on why a  
8   bill of particulars cannot serve as a discovery tool. I  
9   understand that as well. But I take issue with the way that  
10  they've characterized what is being requested here. We're not  
11  asking for closing argument in this case. We're asking for the  
12  facts that are necessary for the elements of the offenses to be  
13  proven. Nor do we think it is sufficient for the government to  
14  point us to -- I think, we're up to 1.3 million-plus pages of  
15  discovery -- and say it's in there somewhere.

16          So stepping back, what is the standard for a bill of  
17  particulars and what is required? It is -- the Court asked  
18  Mr. Irving early on in your colloquy: What is the pleading  
19  standard? Again, I think that's sort of a separate issue.  
20  Whether they have met the bare pleading requirements is not  
21  what we're pointing out here.

22          As the Eleventh Circuit observed in Anderson, quote, "a  
23  bill of particulars, properly viewed, supplements an indictment  
24  by providing the defendant with information necessary for  
25  preparation."

1           THE COURT: Okay. So let's get to that. What  
2 information do you think is necessary for your preparation that  
3 you don't otherwise have in the superseding indictment?

4           MR. WOODWARD: How did the boxes with classification  
5 markings get to the storage room?

6           The narrative, as told by the superseding indictment,  
7 is that we have some 60 boxes in a storage room that are  
8 reviewed by Trump Attorney 1. We also know from evidence,  
9 although not in the -- we also know from the discovery in this  
10 case, that Trump Attorney 1 says he reviewed all of the  
11 documents that were in the storage room.

12           We then have in the indictment a set number of  
13 boxes -- actually, now I'm going to get the numbers wrong  
14 already. Here I thought I would at least get through -- we  
15 have 60 boxes that are moved, roughly 60 boxes that are moved  
16 from the storage room to the residential area. And then we  
17 have half of that, 35 or so boxes, that are moved from -- as  
18 alleged, from the residential area to the storage room.

19           And so, when Trump Attorney 1 conducts the search, the  
20 allegation is not all of the boxes were available to  
21 Trump Attorney 1 when that search was conducted; those boxes  
22 were somewhere else.

23           We don't know if the government's -- believes that they  
24 were in the residence. We don't know if they believe they were  
25 in the office. We don't know if they believe they were in some



1 other location.

2 But what we do know is that what Mr. Nauta is charged  
3 with is concealing documents with classified -- classification  
4 markings that were not present for Trump Attorney 1's review.

5 What we then know is that when the FBI conducted its  
6 search of the storage room and the residence, we -- they  
7 discovered additional documents with classification markings in  
8 one of those two places; only the storage room. And so, the  
9 indictment insinuates -- and I'm ignoring the office because,  
10 to my understanding, Mr. Nauta is not alleged to have moved  
11 boxes in or around the office area, but we can -- we can come  
12 back to that.

13 So they're not -- no classification markings are  
14 discovered in the residence. And now, classification markings  
15 are discovered in the storage room; the insinuation being, is  
16 that they were not there when Trump Attorney 1 conducted the  
17 search of the storage room.

18 THE COURT: Okay. So what is missing in terms of the  
19 allegations there? It's a fairly specific, I would say, very  
20 lengthy 60-page indictment. What exactly is missing in terms  
21 of the movement of boxes? Which boxes went where at what time?  
22 Whether such boxes were the ones that contain the classified  
23 documents or not? What is missing?

24 MR. WOODWARD: The crime that Mr. Nauta is charged with  
25 is moving boxes that contained classification markings. And

1 so, the only way for Mr. Nauta to -- to be guilty of that crime  
2 is if the boxes with documents that had classification markings  
3 got put back into the storage room by Mr. Nauta. And that's  
4 not alleged. We don't know how the boxes that contained  
5 classification markings, that were in the storage room, got  
6 there so that the FBI found them when they conducted their  
7 search of Mar-a-Lago.

8 Because if Mr. Nauta didn't put them there, if  
9 Mr. Nauta didn't move any boxes with classification markings,  
10 he is not participating in any effort to conceal the documents  
11 with classification markings from Trump Attorney 1, the FBI --

12 THE COURT: But doesn't the indictment clearly allege  
13 that he did move boxes containing classified materials?

14 MR. WOODWARD: The indictment alleges that he moved  
15 boxes containing classified materials. We are asking  
16 how the -- what evidence there is of that fact. And a bill of  
17 particulars allows the Court to order the Special Counsel's  
18 office to tell us necessary facts to prepare our defense,  
19 and -- and we don't have those facts. They may claim that  
20 those facts are in discovery, but I don't know them; and so, I  
21 can't prepare my defense of Mr. Nauta without knowing those  
22 facts.

23 THE COURT: It seems like you're expanding the bill of  
24 particulars device. But just so that I understand, the  
25 specific piece of information that you're looking for, say it

1 one more time.

2 MR. WOODWARD: How did the boxes containing  
3 classification markings get to the Mar-a-Lago storage room  
4 prior to the FBI's search on August, I think, 8th -- it might  
5 be 4th, though -- in early August.

6 Because if Mr. Nauta did not move those boxes, then the  
7 government cannot prove that Mr. Nauta moved boxes with  
8 classification markings in an effort to conceal them from the  
9 grand jury.

10 THE COURT: All right. But you have a ton of  
11 discovery, presumably many witness interviews, and other  
12 statements to pore over. Wouldn't it just be the normal  
13 practice for you to look through the discovery and figure out  
14 what evidence exists to support how the boxes got to the  
15 storage room?

16 MR. WOODWARD: Of course. And we've done that.

17 THE COURT: Well, then what's the issue?

18 MR. WOODWARD: We don't know. There is  
19 no -- we're -- we're unaware of what evidence there is that the  
20 government is going to use to prove up this theory.

21 And, again, I'm -- there is, I think, a very important  
22 distinction between asking the government to give its closing  
23 argument, which we're not doing, and asking the government to  
24 identify the evidence in discovery that reveals how the boxes  
25 moved from one place to the other.

1           The indictment makes clear there were more boxes when  
2   the FBI conducted its search than there were when  
3   Mr. XXXXXXXX -- I'm so sorry, Judge -- when the --  
4   Trump Attorney 1 conducted that search. That, the indictment  
5   makes clear.

6           What we don't understand is why. And the discovery, we  
7   submit, does not reveal that answer. And I will take that one  
8   step farther. It seems to us that the Special Counsel's  
9   office's theory on that question, and the way that they present  
10   it to the -- the District Court in D.C., and the way that they  
11   present it in their various affidavits in support of either --  
12   search warrants, et cetera, changes.

13           And so when we -- when we go to the evidence that we  
14   have been provided, their theory on -- on how all of this  
15   played out is inconsistent. And it cannot be, Your Honor, that  
16   the first time Mr. Nauta and his defense counsel learn about  
17   what evidence there is to show that he moved boxes with  
18   classification markings in them is when the Special Counsel  
19   gives its opening statement. And that -- that puts on its head  
20   our ability to prepare an adequate defense for Mr. Nauta.

21           THE COURT: Okay. Thank you.

22           I've -- unless you have something further on your bill  
23   of particulars request, then I will turn it over to  
24   Mr. Harbach.

25           MR. WOODWARD: I don't know if Your Honor wants to

1 table to last this question of the grand jury disclosure or  
2 not, or if you want me to respond to the government --

3 THE COURT: Well, we will -- it's going to become too  
4 lengthy if we try to inject that now. So for now, we're going  
5 to stay focused on the arguments made in the motion.

6 Mr. Harbach.

7 MR. HARBACH: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MR. HARBACH: I'm here to discuss the meaning of the  
10 word "corruptly." And I think my remarks may be -- may be a  
11 little more abbreviated than they otherwise would have, in  
12 light of some of Your Honor's questions to Mr. Nauta. But if I  
13 get to a point where I'm being redundant or it's something you  
14 already know, feel free to just move me along.

15 I think Your Honor hit on a couple of very important  
16 points that should be focused on at the outset.

17 Number 1, the Eleventh Circuit has defined the term  
18 "corruptly" as its used in 1512(c). That's in Friske. And the  
19 language, for the record is: "With an improper purpose and to  
20 engage in conduct, knowingly and dishonestly, with the specific  
21 intent to subvert, impede, or obstruct the proceeding."  
22 Period. "The Eleventh Circuit has ruled on what it means in  
23 the context of this statute."

24 I will go one step further, alluding to a question  
25 Your Honor asked earlier. The government is not aware of any

1 Court finding the word -- the definition of the word  
2 "corruptly" in the context of 1512 to be vague. And Mr. Nauta  
3 certainly cites no such case in the Eleventh Circuit or  
4 otherwise.

5 What he says is, "Well, the Friske court wasn't  
6 specifically entertaining whether "corruptly" was vague. And,  
7 therefore, this Court should give it limited -- limited weight  
8 in deciding what the correct standard should be here." But  
9 note the conflation there.

10 Mr. Nauta's brief opens with: "The correct definition  
11 of 'corruptly' is for the benefit of one's self or another" --  
12 and he's tried to chop off that -- that last part here today.  
13 That's his first argument.

14 We say no. Friske says clearly what the standard is in  
15 the Eleventh Circuit. And he says, okay, well, fine, but it's  
16 vague.

17 What authority does he point to, to say that  
18 "corruptly" is vague? Again, certainly none in the  
19 Eleventh Circuit. He points to Fischer, but neither Fischer  
20 nor Robertson, a case he only cites in a footnote for its  
21 dissent, concluded that "corruptly" was vague.

22 Fischer, as Your Honor plainly understands, concerned  
23 the actus reus part of the crime and deciding whether,  
24 otherwise, as it appears between (c)(1) and (c)(2), means more  
25 stuff like documents or more stuff not like documents. That

1 was the issue there.

2 Now, it is true that Judge Pan in the lead opinion in  
3 Fischer mentions "corruptly" for the proposition that it has to  
4 do some work in the statute so that the residual clause or the  
5 omnibus clause in (c)(2), isn't in danger of being  
6 unconstitutionally overbroad.

7 But a couple of things to note there. One, she  
8 specifically said We're not deciding what corruptly means in  
9 this case for two reasons. One, the conduct of all of the  
10 defendants -- that the conduct of the defendants there was  
11 independently illegal and, therefore, it would have satisfied  
12 any -- any definition of corruptly. And two, she said,  
13 you know, there is this other case in the pipeline, Robertson,  
14 that is about to come down the pike in a couple of months, and  
15 the question of what corruptly means is squarely presented  
16 there, unlike here. So we're not going to entertain it.

17 THE COURT: In -- ultimately, in Robertson, what is the  
18 definition chosen? It's a little bit hard to find exactly what  
19 the definition ultimately adopted is.

20 MR. HARBACH: I had the same reaction, but I think it  
21 ultimately is not too far from what the Eleventh Circuit's  
22 definition is. Give me one second.

23 THE COURT: I kept looking for a sentence in the  
24 opinion like, "'Corruptly' means" -- and then I wasn't quite  
25 finding that.

1 MR. HARBACH: Right, right.

2 So one place it appears is at 367 of the opinion. And  
3 this is -- this is toward the end of where they've -- they've  
4 gone through some other cases. But in 367 it says: "Those  
5 cases confirm, moreover, that the requirement that a defendant  
6 act 'corruptly' is met by establishing that the defendant acted  
7 with a corrupt purpose or via independently corrupt means."  
8 And then quoting another case, "To say that someone corruptly  
9 endeavors to obstruct an inquiry might mean, one, that he does  
10 so with a corrupt purpose, or, two, that he does so by  
11 independently corrupt means, or both."

12 Give me one second.

13 And there is a little bit further elaboration  
14 saying --

15 THE COURT: So, basically, "corruptly" means acting  
16 with a corrupt purpose.

17 MR. HARBACH: Well, this is -- I anticipated the  
18 Court's question. There is a citation to another case that  
19 says: "Whenever the means used are not independently criminal,  
20 the jury cannot avoid considering the defendant's purpose, if  
21 it is to meaningfully determine whether the endeavor was  
22 corrupt or evil or depraved."

23 Again, it is definitely with reference to purpose, to  
24 be sure, which, as I said a moment ago, isn't far from the  
25 Eleventh Circuit's definition.



1           So what's the point? We don't believe that this  
2   course -- this Court has to fully dissect what the D.C. circuit  
3   was trying to say in Robertson. It should be enough that, A,  
4   the Eleventh Circuit has articulated a standard, and B, to the  
5   extent the Court is interested in what another circuit might  
6   have said about it, it's enough to say two things. One, that  
7   the D.C. circuit opinion is pretty close to the  
8   Eleventh Circuit in terms of what it's trying to get at, and  
9   two, it's not vague.

10           The Robertson court didn't determine that it was vague.  
11   The parties didn't even argue that it was vague in the  
12   appellate court, even though they had argued that below in the  
13   district court.

14           So, again, not trying to -- not get conflated here.  
15   Remember, we're only talking about Fischer and Robertson and  
16   that stuff because of the predicate argument that Mr. Nauta  
17   makes that the definition -- that the word "corruptly" is  
18   somehow vague. And so that's our second point with respect to  
19   those opinions. They're not -- they shouldn't be read as being  
20   inconsistent with the Eleventh Circuit. And second, neither  
21   they nor any court we have found that is concluded that  
22   "corruptly" is vague.

23           THE COURT: Although I think you would acknowledge,  
24   right, that -- that it's susceptible to different formulations  
25   and that there are sort of different options and that even

1 courts trying to define the term, frankly, have sort of  
2 struggled in articulating exactly what it means.

3 And so that's what we're left with. Maybe the Supreme  
4 Court provides a little bit of guidance on "corruptly," maybe  
5 it doesn't, but at the end of the day, we have Friske.

6 MR. HARBACH: It's -- it -- I will add one additional  
7 observation there, and it is, I think, in the very last line of  
8 our response brief where we make the point, I think, in  
9 answering the rule of lenity argument, that there are a couple  
10 Supreme Court cases that made clear that just because judges  
11 may disagree at the margins about what a certain term of art  
12 means in the law, that does not necessarily make for ambiguity,  
13 much less unconstitutional ambiguity or grievous ambiguity so  
14 that the rule of lenity is necessary.

15 So, you know, it's not that different from the word  
16 willfully. There is -- that's kind of a messy one too. But,  
17 again, for present purposes on this indictment, with the  
18 guiding case law from the Eleventh Circuit, there is no reason  
19 to conclude that that definition wouldn't work just fine.  
20 There is no reason to think that the cases out of D.C. that the  
21 defendant cites suggests that there is any vagueness in the  
22 term, nor is there any reason to think, for the -- the reasons  
23 Your Honor already expressed, that the Supreme Court in  
24 deciding Fischer will -- will weigh on -- in on this in a  
25 meaningful way, such that the Court can't rule on this Rule 12

1 motion.

2 THE COURT: That all makes sense.

3 Let me just ask you, though, hypothetically, assuming  
4 the test were that you have to procure a benefit for yourself  
5 or someone else, then do you think the allegations in the  
6 indictment still would satisfy --

7 MR. HARBACH: You already said it. Yes, ma'am.

8 THE COURT: And that's because of paragraph 96?

9 MR. HARBACH: That is the -- that is -- well, it's  
10 not -- paragraph 96 is the most explicit place that it's  
11 mentioned, for sure.

12 But the notion that these documents were attempted  
13 to -- being protected so that President Trump could keep them,  
14 I mean, that's pregnant throughout the entire indictment. So,  
15 yes, 96 is explicit about that, but we would share your  
16 skepticism of deleting, or another, or insisting that the  
17 benefit be pecuniary. There is no -- there is no basis for any  
18 of that, even if we went with this quid pro quo theory of  
19 "corruptly."

20 THE COURT: Is it clear to you whether the Supreme  
21 Court will or will not take up the mens rea component, if it's  
22 hard to tell?

23 MR. HARBACH: I will tell you what -- I will tell you  
24 what we do know. It's plainly not within the question  
25 presented to the Court. The only question --

1           THE COURT: Unless you view the question presented to  
2 say, well, in addressing the act as we pull and we draw from  
3 the mens rea, and in that context, you would get there; and  
4 there is a nexus, so we have to kind of address it one way or  
5 the other.

6           MR. HARBACH: All right. So I think this is  
7 exceedingly unlikely. The best case I could -- if I'm playing  
8 the other side, the best case I could make is the Court says,  
9 (c)(2) should be read in the broad way the government wants,  
10 but "corruptly" -- in other words, take Judge Walker's  
11 position. If the Supreme Court took Judge Walker's position,  
12 even then, the answer would be, well, that -- that might  
13 sure -- sure as heck inform the jury instruction that's given  
14 in this case, but it wouldn't mean that there is a pleading  
15 deficiency. The indictment would still be amply pled as it  
16 is --

17           THE COURT: The benefit being, in that case, procuring  
18 the benefit for himself or someone else. What would be the  
19 closest allegation for that in the indictment?

20           MR. HARBACH: It was what we just talked about a moment  
21 ago.

22           THE COURT: 96.

23           MR. HARBACH: If it's the benefit for someone else,  
24 absolutely.

25           And that -- again, explicit in 96, but we would argue

1 it's all over the indictment in terms of what was going on  
2 here, what they were trying to do.

3 THE COURT: Okay. All right. Let's see. So we've  
4 talked about "corruptly." Anything more on that term?

5 MR. HARBACH: Nothing more on "corruptly."

6 I will turn it over to my colleague for the -- if  
7 Your Honor has any questions for us on Mr. Nauta's bill of  
8 particulars arguments.

9 THE COURT: Oh, Mr. Bratt is going to handle that?

10 MR. HARBACH: Yes, ma'am.

11 THE COURT: Okay. Then we will go hear from Mr. Bratt  
12 on that, and then we will, at the end of all of this, turn back  
13 to the grand jury issue.

14 MR. BRATT: Thank you, Your Honor.

15 I will be brief because I know I have touched on some  
16 of this already. But I mentioned one overarching point with  
17 respect to bills of particular, that being that when you have a  
18 detailed indictment and extensive discovery, that a bill of  
19 particulars is generally not warranted.

20 The second point I want to make is that in criminal  
21 discovery, there are no interrogatories, there are no requests  
22 for admissions. And, really, what the -- the manner in which  
23 Mr. Woodward is phrasing what he wants -- and similarly, for  
24 Mr. Irving -- a question that begins with "what" or "how" is a  
25 type of interrogatory that is not in the Federal Rules of

1 Criminal Procedure.

2 And then, the third point I want to make is -- and I'm  
3 now turning to the Maurya -- or Maurya case, M-A-U-R-Y-A, which  
4 is the Eleventh Circuit's most recent discussion of bills of  
5 particular. I just want to quote from it, that they, quote,  
6 "cannot be used as a weapon to force the government into  
7 divulging its prosecution strategy. We do not allow defendants  
8 to" -- and it's now quoting from another case, Bergen --  
9 "compel the government to" -- and I think there is a typo in  
10 the opinion -- "to a detailed exposition of its evidence or to  
11 explain the legal theories upon which it tends -- it intends to  
12 rely at trial."

13 And to -- to look at what Mr. Woodward and Mr. Nauta  
14 put forth as the things they want answered -- actually, on  
15 pages 4 and 5 of, now, the revised reply, ECF Number 447, it  
16 states that they, quote, "seek only particulars regarding three  
17 aspects of the case," and they then list them.

18 The first one is, quote, his alleged -- his,  
19 Mr. Nauta's -- alleged knowledge and participation in the  
20 charged conspiracy and his alleged participations therein.

21 Or put differently, he is seeking a bill of  
22 particulars -- I'm again going to quote Maurya -- or "Maurya":  
23 "That compels the government to provide the essential facts  
24 regarding the existence and formation of the conspiracy, a  
25 practice we have is explicitly forbidden."

1           The second thing that he asks or clarifies in the reply  
2   is Mr. Nauta's alleged knowledge that the charged conduct of  
3   moving a box to a common-access hall at Mar-a-Lago was  
4   undertaken to prevent, rather than comply with a grand jury  
5   subpoena for documents. And that really is the heart of our  
6   theory as to why, as to that aspect of the obstruction  
7   conspiracy, Mr. Nauta is -- is guilty.

8           And then, the third is: What, if any, alleged conduct  
9   by Mr. Nauta would make him liable for attempted obstruction or  
10  violation of any federal criminal law where he is alleged to  
11  have traveled or inspected any items that would have violated  
12  the statute charged?

13          And that is really seeking some sort of legal opinion  
14  from the government as to, again, a basic legal theory  
15  underlying the case.

16          With respect to his claim for: How did the classified  
17  documents get back to -- or get back to the storage room? To  
18  merely state how he is phrasing it is why it is an improper  
19  question or inappropriate question for a bill of particulars.

20          We're not conceding that we have to prove that  
21  Mr. Nauta was involved in classified documents or  
22  classification markings getting back to the storage room.  
23  Really, the gravamen of the offense with respect to the  
24  movement of the boxes is what occurred on June -- June 2, 2022,  
25  where boxes were moved, and Trump Attorney 1 did his review and

1     only found 38 documents. And then later, there was 70-some in  
2     the storage room --

3             THE COURT: So in your view, it's not material how the  
4     boxes containing classified material got to the storage room  
5     prior to August 8th?

6             MR. BRATT: I'm not saying it's not material. What I'm  
7     saying is that it is -- it is not an essential part of the  
8     charge against Mr. Nauta and his participation in that  
9     conspiracy.

10            THE COURT: Because the essential part, in your view,  
11     is?

12            MR. BRATT: Is the movement of boxes on June 2nd.

13            THE COURT: June. June 2.

14            MR. BRATT: And also, I would add that we're not  
15     conceding that all of the documents with classification  
16     markings made it back to the storage room. We expect there to  
17     be evidence at trial that the plane that took the former  
18     president and his family up to New York on June 3, 2022, had  
19     many boxes in it, including boxes in the restroom. And so, in  
20     many ways, we don't know all the boxes that -- that -- where  
21     were all the boxes that may have been removed of the -- of  
22     the -- the delta between the approximately 64 and the  
23     approximately 30, whether all of those actually ever made it  
24     back to the -- to the storage room.

25            I would also add, just on terms of the discovery --



1           THE COURT: And there is a lot of discovery,  
2   1.3 million of unclassified discovery alone. So in that huge  
3   amount, is it possible to direct defense counsel a little bit  
4   more since it is so much?

5           MR. BRATT: Yes. So we already did that, Your Honor.  
6   In our first production to each set of defense attorneys, we  
7   had within our production -- and it was redundant of stuff that  
8   was elsewhere -- we had what we considered to be the key  
9   documents; I guess about 5,000 documents that -- that are  
10  identified as what we view as the key documents.

11           We also had what we viewed as the key video  
12  surveillance clips. So we have put that stuff -- we identified  
13  that for the defense attorneys with our initial productions of  
14  discovery.

15           Recently Mr. Woodward, Mr. Murrell, Mr. Irving, went to  
16  the FBI's Washington field office in D.C. and reviewed the  
17  boxes that were seized by the FBI --

18           THE COURT: Are the boxes in their original, intact  
19  form as seized?

20           MR. BRATT: They are, with one exception; and that is  
21  that the classified documents have been removed and  
22  placeholders have been put in the documents.

23           But in conjunction with their visit a couple of weeks  
24  ago, we prepared for them a chart that lists all the boxes that  
25  had classified documents in them, and which classified

1 documents were in which boxes.

2 THE COURT: So looking, for example, at that detailed  
3 property inventory in the civil case, it's unsealed at docket  
4 entry 116-1 in that proceeding, which is 22-cv-81294. This has  
5 33 items. They're all either listed as a box/container or just  
6 documents.

7 I'm wondering if this list of 33 is the same 33 or 34  
8 that are charged in the indictment. In other words, would this  
9 inventory be at all helpful to the defendants in trying to  
10 understand which boxes are alleged to be the problematic ones  
11 that were moved?

12 MR. BRATT: So we've already -- we've already -- again,  
13 in the summary chart that we gave them recently, we have  
14 identified, you know, the boxes that had classified documents  
15 in -- or documents with classification markings. We have  
16 identified, all right, if it's box -- and they have  
17 different -- like, triple A, or Box AA. While there were seven  
18 classified documents in there, here are the Bates -- classified  
19 Bates ranges for them. These are the markings that were on  
20 there. We have given that to them.

21 THE COURT: Okay. The boxes themselves are unmarked or  
22 were unmarked. And so, trying to number them and keep track of  
23 them, 1 through 33 --

24 MR. BRATT: The FBI --

25 THE COURT: -- that's a -- that's a numbering

1 convention that was put on after the fact, I assume?

2 MR. BRATT: No. There was a numbering convention that  
3 was put on, on the day of the search.

4 THE COURT: That's what I mean.

5 MR. BRATT: Yes.

6 THE COURT: On the day of the search.

7 MR. BRATT: Correct.

8 THE COURT: Okay. All right. Okay.

9 MR. BRATT: In some cases, they're letters. But there  
10 was an identification system that was put on the boxes on the  
11 day of the search.

12 THE COURT: All right. Okay.

13 MR. BRATT: So they have those. We have tried to  
14 direct them to what we believe are the key documents, key video  
15 surveillance. We have identified for them and made the boxes  
16 available to them.

17 We also provide a -- we provided a similar summary for  
18 the boxes at NARA. We do not have -- we have the classified  
19 documents from NARA, but we did not take custody of the boxes  
20 themselves, but they have them in discovery in digital form.

21 THE COURT: And is it correct that the superseding  
22 indictment does not allege that Mr. Nauta knew what was in the  
23 boxes?

24 MR. BRATT: I want to be careful with that because  
25 there is -- at least there -- I think it's paragraph 38.

1 You know, there was a time when he was in the storage room and  
2 a box spilled, and there were classified --

3 THE COURT: With the exception of that one.

4 MR. BRATT: So the indictment does not allege, other  
5 than that, that he was -- the indictment has no language in it  
6 indicating, other than that, that he saw what was in the -- saw  
7 classified documents in the boxes.

8 THE COURT: Okay. And that's, of course, correct for  
9 Mr. De Oliveira as well?

10 MR. BRATT: Correct.

11 THE COURT: Okay. All right. Anything further with  
12 respect to legal argument from either side before we jump into  
13 the grand jury issues, Mr. Woodward?

14 MR. WOODWARD: I would certainly like to be heard in  
15 response, Your Honor.

16 THE COURT: Okay.

17 MR. WOODWARD: So the -- to state the obvious, the  
18 indictment alleges that boxes with documents bearing  
19 classification markings were moved to avoid their discovery.  
20 If that's not true, if boxes bearing classification markings  
21 were not moved, then every count after 33 falls, with the  
22 exception of the false statement counts.

23 And so what -- what the Special Counsel's office has  
24 just explained is that we don't need to know whether the boxes  
25 that were moved on June 3rd contained documents bearing

1 classification markings. I just -- I can't follow that because  
2 if those boxes that were moved -- and specifically, if those  
3 boxes that were allegedly not returned don't have documents  
4 bearing classification markings, then there is no case here.  
5 There is no crime. They weren't moving boxes for the purpose  
6 of concealing the contents from anybody, because the only  
7 documents that the defendants are alleged to have concealed are  
8 those bearing classification markings.

9           The Special Counsel's office in the indictment makes  
10 the assumption that the classification markings that were  
11 discovered by the FBI in its search must have been among the  
12 boxes that were moved on June 3rd; but we don't know why that  
13 is.

14           And so I hear the Special Counsel to be making the  
15 argument that a "why" question is an interrogatory. Fine.  
16 Don't -- don't answer that question for us. Show us the  
17 evidence that, when we view, will help us understand how anyone  
18 could know that there were documents bearing classification  
19 markings that were moved on June 3rd -- or, I guess, that were  
20 not moved.

21           When -- taking a step back. The boxes -- the boxes are  
22 not in their original form, to be clear. I mean, that -- that  
23 is -- that is an unknown, because as the Court is well aware,  
24 there was a process involving a special master in which all of  
25 the boxes were taken and the contents were -- were at least

1 partially reviewed.

2 And so, we don't know, in looking at the evidence --  
3 and we did go, and we looked at -- I personally didn't look at  
4 all of the boxes, but I looked at several of the boxes -- we  
5 don't know if that is the way that the boxes were kept when  
6 they were taken from the storage room. All we know is the way  
7 the boxes were kept when they were provided to the FBI,  
8 following the conclusion of the special master process.

9 So we don't know whether there were documents bearing  
10 classification markings in the bathroom on the plane on  
11 June 3rd. We only know that there were documents bearing  
12 classification markings in a storage room on August 8th when it  
13 was searched by the FBI.

14 And to our knowledge, there is isn't any evidence that  
15 shows how Mr. Nauta, Mr. De Oliveira, or anyone else would have  
16 known that this delta of boxes, this 15 boxes that is -- that  
17 is -- that are not returned to the storage room on June 2nd or  
18 June 3rd contain documents bearing classified information.

19 THE COURT: Well, it sounds like, you -- you know, jury  
20 arguments. But, again, I'm having a hard time seeing how this  
21 indictment doesn't give you the detail that you need. And  
22 then, I -- I take your point that the discovery is exceedingly  
23 voluminous, which I think is obvious, but the Special Counsel  
24 says that it has narrowed it and given you the more relevant  
25 documents in their mind. So I think we've sort of strayed

1 beyond the bill of particulars discussion, and it's really more  
2 of -- just a review of the discovery discussion.

3 MR. WOODWARD: Well, you know, we cite a case from  
4 the -- from D.C., granted. But United States vs. Tree  
5 (phonetic), footnote 12 on page 21, makes clear that simply  
6 pointing us to a volume of discovery isn't -- isn't sufficient.

7 And so, you know, the Special Counsel claims that we  
8 have given you the key "5,000 documents." I'm representing to  
9 the Court that that doesn't tell us the answer. I wouldn't be  
10 here wasting everybody's time --

11 THE COURT: But the answer that you're looking for --  
12 again, I'm really trying to understand. The answer that you're  
13 looking for is the how the boxes -- and by "the boxes," do you  
14 know how many?

15 MR. WOODWARD: Well, when the FBI conducts its search,  
16 there are 74 boxes, I think.

17 THE COURT: So your ultimate question that you're  
18 looking for an answer to is, again, how did --

19 MR. WOODWARD: How did the boxes get in the storage  
20 room.

21 THE COURT: And that is so essential why?

22 MR. WOODWARD: Because if the -- if Mr. Nauta did not  
23 move boxes that contained classified markings, then he didn't  
24 commit the offense as alleged.

25 THE COURT: Okay.

1           MR. WOODWARD: If he is moving boxes that contain shoes  
2 and ties and -- or documents that don't contain classification  
3 markings, then he is not concealing anything from anyone.

4           THE COURT: All right. Okay. Anything more on  
5 "corruptly"?

6           MR. WOODWARD: With respect to "corruptly," I just -- I  
7 just disagree, respectfully, that the Eleventh Circuit tells us  
8 what the definition is. The Eleventh Circuit in Friske accepts  
9 what the trial court used as a definition, but nowhere in that  
10 opinion does it says [sic], "Here's how we are going to define  
11 'corruptly' for this circuit."

12           And, you know, turning, then, to persuasive  
13 precedent -- precedent that we do have, you know, I think  
14 it's -- it's noteworthy to start where we always should, which  
15 is at the statute. And the statute does not define "corruptly"  
16 in the way that the Special Counsel's office is asking this  
17 Court to do it, nor does Friske. The statute simply says  
18 "whoever corruptly."

19           And so we are adding all these -- these meanings. When  
20 you look at Robertson, Robertson says, "Whoever acts -- one  
21 acts corruptly when they act with corrupt purpose."

22           THE COURT: Right, I know. But it's not unusual to  
23 have a mens rea adverb that just -- just is what it is and it's  
24 not further defined, and so jury instructions do the work and  
25 it has a little bit of a circular quality, but that's what the



1 law tolerates.

2 MR. WOODWARD: I appreciate that, Your Honor. But  
3 here, unfortunately, we don't have a corrupt purpose. We don't  
4 have an independently criminal act being committed as part of  
5 these offenses.

6 And so, now, the Court is left to consider what  
7 "corruptly" means in the absence of an independently corrupt  
8 act. Robertson sheds some light on that and says --

9 THE COURT: Well, that's okay. I think we can all  
10 review Robertson, and there is some interesting arguments to be  
11 made there. And we will see if the Supreme Court sheds any  
12 light, it's not clear, on the definition of that term.

13 But I think I have enough with respect to the arguments  
14 on "corruptly."

15 Anything further you wish to add before we turn to the  
16 final topic for today?

17 MR. WOODWARD: No, Your Honor. I can take a hint.

18 THE COURT: Okay.

19 MR. WOODWARD: Do you want to hear from me or from the  
20 government first on grand jury secrecy.

21 THE COURT: How long do the parties think this  
22 conversation will last?

23 MR. BRATT: I don't think it will be very long,  
24 Your Honor.

25 THE COURT: Okay.

1 MR. BRATT: May I just correct one factual thing?

2 THE COURT: Sure.

3 MR. BRATT: I think the Court is aware of this, but in  
4 the special master proceeding, the FBI did not give up custody  
5 of the boxes. Judge Dearie ordered that we copy them and  
6 provide -- copy the unclassified documents and provide them to  
7 the former counsel for Former President Trump, but the boxes  
8 have always been maintained by the FBI as they were seized.

9 THE COURT: Okay. Thank you. All right.

10 Then -- then let me hear first from -- Mr. Bratt, are  
11 you going to handle the grand jury piece?

12 MR. BRATT: Yes.

13 THE COURT: Before we get started, there is this issue  
14 about the transcript of Mr. Nauta. It was attached as an  
15 exhibit to both of the motions set for argument today. It's  
16 still sealed, per the Court's order, but I have some questions  
17 about whether it should continue to be sealed because it was  
18 quoted, at least in part, in a public opposition at 319. And  
19 there appears to be at least some agreement as to public use of  
20 certain portions.

21 And so I could benefit from some guidance on what it is  
22 that the parties view with respect to publication of  
23 Mr. Nauta's own grand jury transcript.

24 MR. BRATT: So I think, Your Honor, that Mr. Nauta  
25 stands differently from other people who testified in the grand

1 jury. And, in particular, as to the application of --  
2 continuing application of Rule 6(e) to their transcripts.

3 Mr. Nauta has now been charged. He has his transcript,  
4 as he -- he is entitled to under Rule 16. And putting aside  
5 the restrictions in the protective order, he otherwise -- and  
6 he could have, from the day that he finished testifying, told  
7 anybody what he said on that day. So I think that he does  
8 stand apart from all of the other witnesses.

9 THE COURT: So it's your view that the entire  
10 transcript can be unsealed at this point as an attachment to a  
11 substantive motion?

12 MR. BRATT: With the same types of redactions that have  
13 been applied to his interview with the FBI. In other words,  
14 you know, to the extent --

15 THE COURT: Witness names?

16 MR. BRATT: Witness names, correct.

17 THE COURT: Okay. Now, in terms of -- just to  
18 understand, this -- the -- footnotes 6 and 7, I think, of the  
19 government's opposition quoted fairly heavily from one portion  
20 of that transcript.

21 Was there any permission needed in order to cite grand  
22 jury material?

23 MR. BRATT: We've received, with respect to Mr. Nauta,  
24 the necessary permission that we -- that's required.

25 THE COURT: Okay. So I'm unclear about what -- what's

1 going on in the background, because all of a sudden, I see  
2 quotations from grand jury transcripts in public filings, and  
3 there is really no context provided for how it is that the  
4 Special Counsel is just at liberty to do that.

5 MR. BRATT: We believe what we did was consistent with  
6 what our continuing obligations are in D.C. and the authorities  
7 we have been given by the Court in D.C. to make things  
8 available. And --

9 THE COURT: I have seen one petition.

10 MR. BRATT: Right.

11 THE COURT: And, of course, we will speak in general  
12 terms. But that one does not cover Mr. Nauta's grand jury  
13 transcript. And so, again, it's just very ambiguous what it is  
14 that's going on in the background and how it is that these  
15 permissions are being granted. And, of course, there is no  
16 visibility from this District Court's perspective.

17 MR. BRATT: So our view is that Mr. Nauta's transcript,  
18 again, with the appropriate redactions, can now be made public.

19 THE COURT: And that is because there is an order that  
20 exists authorizing, or because it's -- for the reasons you said  
21 earlier?

22 MR. BRATT: It's more for the reasons I said earlier.

23 THE COURT: But is there an order authorizing the use  
24 of that transcript in a -- in connection with the judicial  
25 proceeding, let's say?

1 MR. BRATT: So I would have to go back and check with  
2 respect to that particular transcript, but there may not be an  
3 order directly addressing it.

4 THE COURT: Okay. So, then, let's step back for a  
5 minute and just, to the extent you're able in open court, to  
6 describe for me what is going on with respect to the grand jury  
7 proceedings. There has been a request recently made by  
8 Mr. Woodward to transfer any outstanding grand jury proceedings  
9 relevant to this particular investigation to this Court; and,  
10 again, it's very opaque.

11 MR. BRATT: So, one, we provided in discovery  
12 everything that we think is discoverable that arose out of any  
13 proceedings that were in the District of Columbia. And we've  
14 received authorization to do that.

15 There are certain aspects, and I will just speak in  
16 very broad terms, as to what Mr. Woodward is now seeking be  
17 disclosed. The Court entered an order, I think, yesterday,  
18 that responses to Mr. Woodward's petition are due on the 22nd,  
19 and we will file our response then.

20 We have had to get permission for a couple of  
21 proceedings before this Court to transfer -- or to disclose  
22 things. One was related to the Garcia hearings. One was  
23 related to a sealed matter that the Court has. That is pretty  
24 much the universe of --

25 THE COURT: But it seems like we're at the juncture now

1 where it would be incumbent upon Special Counsel to, at least  
2 in a sealed capacity, inform this Court of, okay, what are the  
3 grand jury proceedings that are relevant to this case, and what  
4 petitions for use have been filed. What orders are authorizing  
5 the use?

6 It's just -- it's just -- it's impossible to really  
7 know. And that's -- that's what I'm struggling with.  
8 Obviously, the only issue now is -- for today's hearing was the  
9 transcript of Mr. Nauta; I think that one is easier to handle.  
10 But there are other items that may be implicated with  
11 these continuing grand jury secrecy, and I just want to get to  
12 the bottom of it.

13 MR. BRATT: So we don't think there's anything else  
14 that remains in the District of Columbia that is discoverable  
15 or needs to be brought to any Court's attention.

16 THE COURT: Is there any pending grand jury matter  
17 related to this particular investigation?

18 MR. BRATT: No.

19 THE COURT: So what's the Special Counsel's view on  
20 continued secrecy for any of those items, given the closure of  
21 that investigation?

22 MR. BRATT: So under both -- well, particularly Fifth  
23 Circuit law, which now -- which predates 1980 -- there was a  
24 case that we cited in one of our pleadings -- I don't have the  
25 name of it at the top of my head. But the Fifth Circuit has

1 ruled that -- or previously ruled that grand jury material  
2 remains subject to Rule 6(e). If it -- materials, obviously,  
3 that come out at trial no longer have the 6(e) protection. But  
4 if there are other 6(e) materials that are never used at trial,  
5 they're never made public, they remain subject to 6(e).

6 THE COURT: So what if a defendant wants to rely on  
7 grand jury materials in support of a substantive 12(b) motion?  
8 Then what standard -- what legal standard applies to that in  
9 the context of a closed grand jury, like we have here?

10 MR. BRATT: So, again, a closed grand jury remains  
11 secret. I know there was a decision in the last couple of  
12 years from the D.C. circuit, and I think it's consistent with  
13 the decision in the Eleventh Circuit, that even for a closed  
14 grand jury proceeding, a Court -- and that was where a District  
15 Court -- one of the District Court judges wanted to release  
16 grand jury material, and that was appealed to the D.C. circuit,  
17 and said, no, even if it's a closed proceeding, Rule 6(e) still  
18 governs.

19 So our position is if the --

20 THE COURT: But if a defendant wants to rely on that  
21 material in support of a substantive 12(b) motion in a judicial  
22 proceeding, then how does the analysis change, if it does, in  
23 the context of a closed grand jury?

24 MR. BRATT: So I think that can be at -- a sealed  
25 exhibit to the substantive Rule 12(b) motion. But, again, I

1 don't think the courts differentiate between an open and a  
2 closed grand jury. There are -- there is more sensitivity in  
3 an open grand -- in an open grand jury, and certainly -- and  
4 certainly that has to be protected because that can interfere  
5 with the investigation. But the other reasons that 6(e)  
6 material remains nonpublic, which is privacy of the witnesses,  
7 reputational damage to people who are in charge, those -- those  
8 concerns continue whether it's an open grand jury or a closed  
9 the grand jury.

10 THE COURT: But if the materials that are wanting to be  
11 used in support of a 12(b) motion don't have the privacy  
12 implications, and we're not dealing with an ongoing  
13 investigation or jeopardizing informants or any of those other  
14 things that would traditionally be thought of as continued  
15 secrecy, then what are we left with?

16 MR. BRATT: So I go to the line of cases that if  
17 it -- certainly, right, if a witness is up on the stand,  
18 defense has the witness's grand jury transcripts, the witness  
19 has said something different, full ability to cross-examine and  
20 impeach the witness on the stand with the grand jury material.  
21 That material is now in the public realm and is not protected  
22 by 6(e).

23 Other materials -- and similarly, you know, any witness  
24 who appears before the grand jury could stand on the courthouse  
25 steps and say, "I was just in the grand jury. This is what I



1     said." So that, obviously, you know, is also a way in which  
2     grand jury material can come out.

3             But at least my understanding of the law of 6(e) is  
4     that unless it comes out in that sort of fashion, or unless it  
5     comes out at trial, it remains subject to the 6(e) protections.

6             THE COURT: So if you were to apply, let's say, the  
7     First Amendment standard to these documents, you would then  
8     say, presumably, the compelling government interest is just,  
9     generally, Rule 6(e) secrecy, and that permits the full-blown  
10    sealing of any grand jury transcript or quotation; is that  
11    right?

12            MR. BRATT: That's correct.

13            THE COURT: Now, as far as the other pretrial motions,  
14    just trying to sort through, what grand jury material exists in  
15    this case that would be attached in support of these motions?

16            I know we have Mr. Nauta's grand jury transcript. We  
17    have some judicial orders, correct me if I'm wrong, with  
18    respect to an attorney-client privilege issue.

19            MR. BRATT: Correct. And there is -- there  
20    are -- there are the exhibits that were produced in conjunction  
21    with that order.

22            THE COURT: So there still needs to be a hearing now,  
23    in this district, with respect to use or reference to those  
24    particular exhibits for that one motion, yes?

25            MR. BRATT: Right. And that has now been transferred

1 to Your Honor for the disclosure of that.

2 THE COURT: For that one motion.

3 MR. BRATT: Yes.

4 THE COURT: Any other grand jury things that are  
5 floating around, as far as attachments to substantive motions?

6 MR. BRATT: May I have a moment, Your Honor?

7 THE COURT: Yes.

8 MR. BRATT: I don't think so, but we will verify that.

9 THE COURT: Okay. Yes, I think it would help the Court  
10 to have, like, a status report under seal of exactly, sort of,  
11 what is the lay of the land on grand jury materials as used in  
12 this proceeding and any pending grand jury petitions for use of  
13 that material in this proceeding. Because all I have been  
14 presented with is that one single petition for one motion  
15 containing exhibits that, of course, were not Mr. Nauta's  
16 deposition and may not cover any other items to be used in this  
17 case.

18 MR. BRATT: Correct.

19 THE COURT: So -- okay.

20 MR. BRATT: I think that's the -- the primary thing  
21 that remains.

22 THE COURT: But net-net, you don't have an objection to  
23 full-blown unsealing of Mr. Nauta's transcript, with the  
24 exception of the witness names other than his own; right?

25 MR. BRATT: That's correct. Yes.

1 THE COURT: Okay. All right. Then I think I have  
2 covered that.

3 Mr. Woodward, anything on grand jury issues?

4 MR. WOODWARD: So, briefly, Your Honor. Because I  
5 think we're as confused as the Court is on how these  
6 proceedings have played out. You know, Rule 6 does not  
7 authorize the government, writ large, here in the Special  
8 Counsel's office to disclose grand jury materials, yet we have  
9 a significant amount of grand jury materials in discovery in  
10 this case.

11 And so, I think the Court really asked a prescient  
12 question: How is it that the government was authorized to  
13 disclose to the defendants in this case, the grand jury  
14 materials?

15 I will tell you that in the -- in the District, the  
16 practice is, concomitantly, with the entry of a protective  
17 order, there is also a Rule 6(e) order in which the District  
18 Court presiding over a matter authorizes the government to  
19 disclose Rule 6 materials.

20 My understanding is that the practice in this Court is  
21 that, you know, defendants actually don't get the grand jury  
22 materials as early on as we did, and that they're often  
23 treated, instead, as Jencks, and produced much closer to trial.

24 The protective order in this case does not specifically  
25 address grand jury materials. So instead, what we have are

1 materials covered by Rule 6, which on its face precludes the  
2 government from disclosing those materials, and no order  
3 explaining why all of these materials have been produced to us.

4 Now, as the Court mentioned, as I have noted in our  
5 filing this week, we have petitioned the District Court in D.C.  
6 to transfer -- well, first, to disclose to Your Honor all of  
7 the proceedings with which we're aware. We had -- we had made  
8 a broader request for our -- our motion to be -- and I'm going  
9 to -- I'll go back to the court today. I'm sorry. It's just  
10 been a week. But I'm going to ask the Court for leave to share  
11 the motion with Your Honor so you can see what specifically we  
12 have asked to do.

13 We asked the District Court in D.C. to docket that  
14 motion in every grand jury matter that pertained to the  
15 investigation of Former President Trump; and they respectfully  
16 declined to do that. I'm not terribly surprised, as Your Honor  
17 will appreciate.

18 But, you know, we don't know what we don't know. And  
19 so if what we're hearing from the Special Counsel's office  
20 today is that there was some proceeding authorizing them to  
21 disclose Mr. Nauta's grand jury transcript, why don't we know  
22 about that?

23 I mean, Rule -- Rule 6(e) also very specifically gives  
24 the party whom the transcripts relate to, or the party to the  
25 proceeding, an opportunity to weigh in. And -- and we weren't

1 asked to weigh in on the disclosure of Mr. Nauta's transcript.

2 Now, with respect to the question at hand on whether,  
3 under Eleventh Circuit precedent, there is a reason for the  
4 Court to continue the sealing of Mr. Nauta's transcript -- we  
5 don't think so. I mean, frankly, candidly, I'm not thrilled  
6 about the idea of Mr. Nauta's transcript being on the public  
7 docket. There was all sorts of press this morning about  
8 the -- about his FBI interview transcript. But that is what it  
9 is. I mean, the First Amendment is the First Amendment, and we  
10 don't feel -- you know, I don't have a case to cite for you  
11 that says, here is the imperative for keeping Mr. Nauta's  
12 transcript sealed.

13 And the only other thing we will observe -- and we  
14 appreciate the Court's time and attention on this -- is that  
15 it's a -- filing has become complicated because of the way that  
16 the discovery was handled. And so, you know, the idea that we  
17 have to seek the Special Counsel's permission or leave of court  
18 in order to reference any of this stuff, it's a huge burden on  
19 us. And so, for that reason, I'm not disappointed that -- that  
20 Mr. Nauta's transcript will be unsealed.

21 THE COURT: Okay. So just to summarize and simplify,  
22 we all are on the same page, as far as I can tell, that the  
23 transcript should be made public in accordance with the witness  
24 name redaction rule, with any appropriate substitutions.

25 I will order, though, a status update to be filed by

1 the government under seal in a non-ex-parte fashion, just  
2 explaining to the Court what, if anything, is outstanding in  
3 the nature of grand jury materials in this case.

4 And then, Mr. Woodward, you should also file under seal  
5 the petition that you filed on April 10th, and you don't have  
6 to file a separate motion for leave to do so under seal; I will  
7 just authorize that now.

8 MR. WOODWARD: Thank you.

9 Your Honor, I do think one more request we would make  
10 is that under Rule 6 -- under -- under Rule 6, Mr. Nauta's  
11 grand jury transcript -- well, no, I think we're good. I'm  
12 sorry.

13 THE COURT: If you think of it in the next 30 seconds,  
14 let me know. Okay.

15 MR. WOODWARD: Thank you, Your Honor.

16 MR. HARBACH: Your Honor?

17 THE COURT: Yes.

18 MR. HARBACH: May I ask a question about what you just  
19 said?

20 THE COURT: Yes.

21 MR. HARBACH: In Your Honor's order directing us to  
22 provide a status report to Your Honor, you said: What is  
23 outstanding in the nature of grand jury materials?

24 I have in my notes from what you said a few minutes  
25 ago, two parts to that: 1, Grand jury materials that are

1 already in this proceeding; and then, 2 --

2 THE COURT: That have been submitted in discovery in  
3 this proceeding --

4 MR. HARBACH: Yes, Your Honor.

5 THE COURT: -- or attached to a substantive motion in  
6 this proceeding.

7 Okay.

8 MR. HARBACH: Okay. And then, I -- please forgive me  
9 if I misheard you, but I thought you also said you wanted to be  
10 advised about any pending petitions for materials to be used in  
11 this proceeding. Is that right?

12 THE COURT: Yes. Is there an issue with that?

13 MR. HARBACH: No. No. I just wanted to make sure I  
14 understood Your Honor.

15 THE COURT: And then I should add also, just in terms  
16 of the question about any order that might have existed  
17 previously that would have authorized the use of Mr. Nauta's  
18 grand jury transcript in this case, because, again, that came  
19 as somewhat of a surprise.

20 MR. HARBACH: Understood.

21 THE COURT: Okay.

22 MR. HARBACH: And, I -- you know, it also occurs to me  
23 that to the extent Mr. Woodward has any heartburn about  
24 Mr. Nauta's grand jury transcript, he is free to withdraw it.  
25 We didn't -- we didn't seek to put it on the public record,

1     they did. So if there is issue with it, he can withdraw it,  
2     and we won't object.

3             THE COURT: That's -- that's a fair point.

4             Mr. Woodward, do you wish to withdraw the transcript?

5             MR. WOODWARD: No, Your Honor.

6             THE COURT: Okay. Then the motion will stay as it has  
7     been filed.

8             I do want to make just one broad formatting point for  
9     all filing parties, to please ensure that everything is  
10    double-spaced and 12 point font.

11            Mr. Woodward, you have not been very strict with that.  
12    So let's just make sure that all future filings are in that  
13    double-spaced format.

14            MR. WOODWARD: Your Honor, I have -- I saw that, and so  
15    I corrected the font when I filed the motion.

16            THE COURT: Yes, I noticed that.

17            MR. WOODWARD: Yeah. I'm sorry about that.

18            THE COURT: All right. Okay. Thank you. That's all  
19    we have. That was the agenda for today, and we've gotten  
20    through it in about two hours. So thank you all for being  
21    here. I have nothing further. Have a nice weekend. The Court  
22    is in recess.

23            (These proceedings concluded at 4:06 p.m.)  
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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate  
transcription of the proceedings in the above-entitled matter.

<u>DATE:</u> 04-15-2024	/s/Laura Melton
	LAURA E. MELTON, RMR, CRR, FPR
	Official Court Reporter
	United States District Court
	Southern District of Florida
	Fort Pierce, Florida

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